Supreme Court, U.S.
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No. 03-895

In the

Supreme Court of the United States

WALTER ROSALES, MARIE TOGGERY, and KAREN TOGGERY,

Petitioners,

v.

UNITED STATES OF AMERICA, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, and NATIONAL INDIAN GAMING COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a federally recognized Indian tribe is a necessary and indispensable party to an action by individual Indians to enforce their allotments of non-tribal land pursuant to 25 U.S.C. 345.

Whether individual Indians can be deprived of all rights and remedies provided by 25 U.S.C. 345, when a subsequently recognized Indian tribe falsely claims sovereignty over non-tribal land allotted to the individual Indians.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, filed August 11, 2003, is set forth in the Appendix ("App.") pp. 1a-5a. The opinion of the United States District Court for the Southern District of California, filed April 22, 2002, is set forth in the Appendix at pp. 5a-17a.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Ninth Circuit denied the Petitioners' Petition for Rehearing on September 19, 2003. App. p. 18a. This Petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth Amendment, U.S. Const. amend. V, actions for allotments pursuant to 25 U.S.C. 345, and Rule 19 of the Federal Rules of Civil Procedure, the relevant portions of which are set forth verbatim at App. pp. 19a-22a.

STATEMENT OF THE CASE

Introduction

The United States has allowed a false claim of sovereignty by a recently created, non-historical, reorganized Indian tribe to deprive the individual

Indian Petitioners of all rights and remedies to enforce their allotments in trust Parcel 597-080-01, pursuant to 25 U.S.C. 345.

The Ninth Circuit court of appeals decision in this case, erroneously found the Jamul Indian Village to be a necessary and indispensable party to this action, and thereby denied Petitioners' all rights and remedies to enforce their allotments in trust Parcel 597-080-01, pursuant to 25 U.S.C. 345.

The Ninth Circuit's decision in this case conflicts with long standing precedent in the Eighth and Tenth Circuits, and denies individual Indian owners of millions of acres of allotted land in the nine western states the remedies to enforce their allotments provided in 25 U.S.C. 345. Here, the Ninth Circuit is alone among the circuit courts of appeals in erroneously holding that a federally recognized tribe is a necessary and indispensable party to an action to enforce individual Indians' allotments under 25 U.S.C. 345, requiring dismissal of the individual Indians' claims due to the tribe's sovereign immunity. Such a disparity in outcome, based upon in which circuit the allotment was made, has not been, and cannot be, justified.

While the general practice of allotting reservation land to individual Indians ceased with the passage of the Indian Reorganization Act of 1934 ("I.R.A.") 25 U.S.C. 461, the United States concedes that more than 90 million acres of America have been "allotted" to Indians since passage of the General Allotment Act of 1887. Felix Cohen, Handbook of Federal Indian Law (DOI 1982) Ch. 11, Sec. B1, p.614. Moreover, the United States continues to accept

individual gifts of land from private citizens, as here, in trust for the benefit of designated individual Indian "allottees," pursuant to the Indian Reorganization Act. 25 U.S.C. 465. Felix Cohen, Handbook of Federal Indian Law (DOI 1982) Ch. 1, Sec. D4, p.41, n. 118. Some of the more well known allotments in Southern California that have been before this Court include those in and around Palm Springs, involving individual members of the Cabazon, Augustine, Torres-Martinez and Agua Caliente Bands of Mission Indians. Felix Cohen, Handbook of Federal Indian Law (DOI 1982) Ch. 11, Sec. B1, p.614, n. 20.

Certiorari should be granted in this case to eliminate the conflict among the circuit courts of appeals, and to decide important questions of federal Indian law that have not been, but should be, settled by this Court to prevent false claims of sovereignty from taking individual Indian allotments without just compensation. Without this Court's intervention, thousands of Native Americans with millions of acres of land in the nine western states of the Ninth Circuit will continue to be deprived of the remedies Congress provided in 25 U.S.C. 345.

Procedural History

Petitioner's Complaint was filed on May 30, 2001. Respondents moved to dismiss pursuant to Fed. R. Civ. P. 8(a) and 12(b)(6), which motion was denied by the District Court for So. California on October 15, 2001. An Answer was filed on behalf of the Respondents on November 1, 2001.

Respondents again moved to dismiss, or in the alternative, for judgment on the pleadings and summary judgment on November 9, 2001, alleging that there was no ripe case or controversy, Petitioners lacked standing, and Petitioners had failed to exhaust administrative remedies.

On February 14, 2002, the District Court for So. California granted the Respondents' motion for summary judgment, and denied the Respondents' motions to dismiss and for judgment on the pleadings.

Petitioners moved for new trial, or in the alternative, relief from judgment on February 22, 2002. The District Court for So. California construed Petitioner's motion for a new trial as a motion for reconsideration, and then denied Petitioners' motion for reconsideration, on April 22, 2002. App. at pp.5a-17a.

Petitioners timely filed a notice of appeal of the District Court's order granting summary judgment, and denying Petitioners' motion for new trial and relief from judgment, which had been construed as a motion for reconsideration, on May 10, 2002. The United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision in an unpublished Memorandum Decision on August 11, 2003. App. pp.1a-4a.

Petitioners timely filed a motion for rehearing, which was denied by the United States Court of Appeals for the Ninth Circuit on September 19, 2003. App. p.18a. This petition was timely filed on December 18, 2003.

Statement of Facts

Petitioners, Walter Rosales, Marie Toggery, and Karen Toggery, are Indians with half or more degree of California Indian blood, and are enrolled members of the Jamul Indian Village, a tribal governmental entity of Kumeyaay Indians, recognized by Congress in 1981, governed by a constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq., and located in Jamul, California.[1]

On September 26, 1912, J.D. Spreckel's Coronado Beach Company deeded 2.21 acres of land in Jamul, California, to the Roman Catholic Bishop of Monterey and Los Angeles, "to be used for the purposes of an Indian graveyard and approach thereto." Petitioners and their families were, from their birth, occupants by sufferance, in possession of certain private property, contiguous to that Indian graveyard, which was owned by the non-Indian Daley family.

During the latter part of the 1970's the Petitioners and their families negotiated a gift of the property that they possessed. The Daleys agreed to convey title to the land to the United States in trust for the explicit benefit of those half-blood Jamul Indians then occupying the property. The Daleys used this form of conveyance to provide a place for the Petitioners and their families to live in perpetuity, protected by the United States, as a trustee, against all forms of

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[1] Marie Toggery died during the pendency of this dispute. Her surviving claims are now being prosecuted by the representative of her estate, Karen Toggery.

alienation, trespass and infringement.

On December 27, 1978, the Daleys, recorded a grant deed of parcel 597-080-01, consisting of approximately 4.66 acres, to "the United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." However, upon the recording of the grant deed, the United States failed to issue trust patents to the individual beneficiaries of that deed, as provided for in 25 U.S.C. 348.

Instead, in the absence of specifically prescribed designation procedures, the Secretary of the Interior designated the Petitioners, among other half blood Jamul Indians, as beneficiaries of trust Parcel 597-080-01, by locating them on the property, acquiescing in their continued presence, possession and use of Parcel 597-080-01 for 25 years, building houses for them on the Parcel, and providing the Petitioners with services usually accorded Indians who have been designated beneficiaries of land acquired and held in trust for individual Indians under 25 U.S.C. 465.

Similar forms of grant deeds have long been accepted by the BIA and similar designations of individual Indians' trust allotments have long been made by the BIA, and enforced by the courts. See, *Coast Indian Community v. U.S. ("Coast")*, 550 F.2d 639, 651, n32 (Fed. Cl. 1977); *United States v. State Tax Comm.*, 535 F.2d 300, 304 (5th Cir.1976); and Memoranda of the Solicitor of the Interior, reprinted in 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-74 ("Mem. Sol. Int.") at 668, 724, 747, and 1479, involving for e.g., the

Mississippi Choctaws, the St. Croix Chippewas, the Nahma and Beaver Indians, and the Nooksack Indians.

The grant deed was recorded on December 27, 1978, three years before Congress recognized the creation of the tribe known as the Jamul Indian Village in 1981. This deed was accepted by the United States, pursuant to 25 U.S.C. 465, on behalf of the individual Jamul Indians of one-half or more Indian blood, who were then in possession of the parcel. The Petitioners thereby became entitled to this allotment of land under 25 U.S.C. 465, and 25 U.S.C. 345.

On May 9, 1981, Petitioner Watler Rosales certified that sixteen of twenty three registered voters adopted the Jamul Indian Village constitution, pursuant to the Indian Reorganization Act of 1934. 25 U.S.C. 476. The United States acknowledged the adoption of the constitution on July 7, 1981, and Congress recognized the Jamul Indian Village by publication in the Federal Register on November 24, 1982. When the Jamul Indian Village was created on May 9, 1981, it was a landless governmental entity.

The United States has confirmed that Parcel 597-080-01 was accepted into trust on behalf of individual Indians, including the Petitioners, and not on behalf of any then recognized, or any subsequently recognized, Indian tribe. The United States' August 3, 2000 response to Petitioners' Freedom of Information Act ("FOIA") request, contains a May 9, 2000 memo from Carmen Facio of the Pacific Regional office of the BIA to Nancy Pierskalla and George Skibine of BIA in Washington, D.C., stating that the: "[c]urrent trust parcel was accepted into trust in 1978 for Jamul Indians

of ½ degree (4.66 acres)," and that there is "no record of the 1978 trust parcel being known as the Jamul Village."

There is no subsequent record of any transfer of Parcel 597-080-01, from the United States' trust on behalf of the individual half-blood Jamul Indians designated by the Secretary, to any tribe, including the Jamul Indian Village.

All individual designated allotment beneficiaries of land held in trust by the United States are cotenants. Cohen, Handbook of Federal Indian Law (DOI 1982) Ch. 11, B3, pp.615-16. As such, cotenants have equal rights to possession, and no single cotenant has the right to exclude any other cotenant from the property. Cal. Civil Code 685-86; *Zaslow v. Kroenert*, 29 Cal.2d 541, 548 (1946). Therefore, all of the individual cotenants must consent to any transfer of their interest in the trust parcel to any subsequently recognized tribe.

Here, there is no evidence of any consent by the Petitioners to such a transfer. Nor is there any wonder why the Petitioners have never consented to such a transfer of their individual interests to the subsequently created tribe. The Interior Board of Indian Appeals has found non-members illegally participating in the Jamul Indian Village tribal government since the tribe was first recognized. 32 IBIA 166.

The Solicitor of the Interior specifically advises the field personnel of the BIA that any transfer of individual Indians' designated trust allotments must

still be accomplished the old-fashioned way, by recording a grant deed. 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-74 ("Mem. Sol. Int.") at 668, 724, 747, and 1479. Where, as here, no subsequent grant deed was recorded, the Petitioners' designated allotments in the trust property cannot have been transferred to any subsequently recognized tribe.

On or about February 5, 2001, the United States published a notice calling for the "razing" of the Petitioners' homes on their allotments in parcel 597-080-01, and their "displacement" from their allotment in parcel 597-080-01. Publishing the February 5, 2001 notice has, both denied, and excluded, the Petitioners from the quiet enjoyment of their allotments as designated beneficiaries of the trust Parcel 597-080-01. The United States' denial of Petitioners' entitlement, and exclusion from their allotment of land, has caused the Petitioners severe property damage, consequential damages, physical and bodily injury, including severe emotional distress, subject to proof at trial.

Petitioners are entitled to enjoin the alienation of their allotments, and prohibit the razing of their homes on their allotments, because the United States has admitted that parcel 597-080-01 is not land over which an Indian tribe exercises governmental power, since it was deeded to the U.S. in trust for certain individual Indians, including the Petitioners, and was not deeded in trust for any recognized Indian tribe, then in existence, or subsequently recognized by Congress. By virtue of their allotments in, and designation as beneficiaries of, the trust parcel, the Petitioners possess fee simple property rights in parcel

597-080-01, as against all others, save the United States. These usufructuary rights entitle the Petitioners to exclude all others, including the subsequently created tribe and those that seek to trespass upon their designated allotments to raze their homes.

Petitioners therefore seek a declaration of their rights to their allotment in, and designation as trust beneficiaries of, parcel 597-080-01, pursuant to 25 U.S.C. 345. They also seek to enjoin the Respondents from denying, and otherwise excluding the Petitioners from, their allotment in, and designation as trust beneficiaries of, parcel 597-080-01.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The Ninth Circuit decision in this case is in conflict with the decisions of the Eighth and Tenth Circuit courts of appeals, which hold that a federally recognized tribe is not a necessary and indispensable party to an action to enforce an individual Indian's allotment under 25 U.S.C. 345. *Antoine v. United States ("Antoine")*, 637 F.2d 1177, 1181-82 (8th Cir. 1981), *reaffirmed after remand*, 710 F.2d 477, 478; *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier ("Potawatomi")*,17 F.3d 1292, 1294 (10th Cir. 1994), *reaffirmed after remand*, 142 F.3d 1325, 1329.

Here, the Ninth Circuit decision erroneously holds that the subsequently recognized tribe, known as the Jamul Indian Village, is a necessary and indispensable party to the individual Indian Petitioners' action to enforce their allotments in non-tribal land, which they acquired when the land was deeded to the United States in trust for their individual benefit, three years before the tribe was established under 25 U.S.C. 476. App. 1a-4a.

Here, the Jamul Indian Village is not a necessary or indispensable party to Petitioners' action, because there is no evidence in the record that it ever claimed a "legally protected interest" in Parcel 597-080-01. See for e.g., *Yellowstone County v. Pease*, 96 F.3d 1169, 1172 (9th Cir. 1996); *Antoine v. United States*, 637 F.2d 1177, 1181-82 (8th Cir. 1981); *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*,17 F.3d 1292, 1294 (10th Cir. 1994). As held by both the Ninth and Tenth Circuits, a "legally protected interest" excludes those "claimed" interests that are "patently frivolous." *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992); *Davis v. United States* 192 F.3d 951, 958-59 (10th Cir. 1999).

Contrary to the Ninth Circuit's erroneous finding, App. 2a, the United States has already conceded that the Village has not "claimed jurisdiction over the parcel of land at issue in this action." The United States' response to Petitioners' FOIA request, contains a May 9, 2000 memo from Carmen Facio of the Pacific Regional office of the BIA to Nancy Pierskalla and George Skibine of the BIA in Washington, D.C., stating that the: "[c]urrent trust parcel was accepted into trust in 1978 for Jamul Indians of ½ degree (4.66

acres)," and that there is "no record of the 1978 trust parcel being known as the Jamul Village."

However, even if the Ninth Circuit's finding was not erroneous, it would still conflict with the Eighth and Tenth Circuit decisions in which a tribe's claim to individual Indians' allotments does not make the tribe a necessary or indispensable party to an action to enforce the individual Indians' allotments pursuant to 25 U.S.C. 345. *Antoine v. United States*, 637 F.2d 1177, 1181-82 (8th Cir. 1981); *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1294 (10th Cir. 1994).

> This language [of 25 U.S.C. 345] is unequivocal. The United States, as the allotting agent, is the appropriate defendant in suits involving the right to an allotment. In our view, determining whether an Indian should have received a patent for an allotment of land under section 345 requires the presence of no party other than the United States. Furthermore, if it is determined that the United States wrongfully withheld a patent for an allotment, the government may be held liable for damages, regardless of the presence or absence of other potential parties. *Antoine*, 637 F.2d 1177, 1181.

The Ninth Circuit's decision also fails to acknowledge and distinguish the Tenth Circuit's decision in *Potawatomi*, 17 F.3d 1292, 1294. There, the Tenth Circuit reversed the district court's finding that

a "tribe" was necessary or indispensable to an action over trust allotments, because the "tribe" had no "protected interest" in the individual Shawnee Indians' trust applications.

There, as here, the Tenth Circuit found that the BIA had the power to grant trust allotments of land to individual Absentee-Shawnee Indians within the Potawatomi reservation, under 25 U.S.C. 465 and a May 23,1872 Act of Congress, ch. 206, 17 Stat. 159 (1872). The Potawatomis sued the BIA to prevent the grant of such trust allotments to the individual Absentee-Shawnee Indians. The Tenth Circuit reversed dismissal for failure to join the Absentee-Shawnee "tribe," finding that the United States had failed to show that the Absentee-Shawnee tribe had a "legally protected interest," since the Absentee-Shawnee tribe had never been granted an "undivided trust or restricted interest" in the land.

There, as here, the Tenth Circuit found that the alleged "interest" of the Absentee-Shawnee tribe was merely an expectation, just as the alleged "interest" of the Jamul Indian Village is merely an expectation that has not yet come to pass, and such expectations do not constitute a legally protected interest for purposes of necessary party analysis under Fed. R. Civ. P. 19. *Potawatomi*, 17 F.3d at 1294.

In *Potawatomi*, the BIA never transferred any trust or protected interest to the Absentee-Shawnee tribe, just as in this case, the BIA never transferred any trust or protected interest in Parcel 597-080-01 to the Jamul Indian Village, after the Petitioners became designated beneficiaries of the trust parcel. Therefore

the Tenth Circuit found that the "tribe" had no conflict with the designated individual Indian trust applications, and was not a necessary or indispensable party to the action.

> The 1872 Act does not create any "undivided trust or restricted interest" of the Absentee-Shawnee tribe in the Potawatomi tribe's land for purposes of 25 C.F.R. 151.8. It merely grants the Secretary of Interior the power to allot land to individual Absentee-Shawnee tribesmen. The Act does not mention any power to allot lands to the Absentee-Shawnee collectively as a tribe. Moreover, as the Potawatomi tribe correctly points out in its brief, this "interest" is merely an expectation of the Absentee-Shawnee tribe that the BIA will evaluate their applications as they would Potawatomi applications. This expectation is not a legally protected interest for purposes of 12(b)(7) necessary party analysis. ...
>
> In the absence of evidence showing the nature of the Absentee-Shawnee tribe's interest in Potawatomi land, the BIA failed to sustain its burden with respect to its motion under 12(b)(7). For this reason the district court abused its discretion in dismissing the action. *Potawatomi*, 17 F.3d 1292, 1294.

Here, there is a similar lack of evidence showing any protected interest of the Jamul Indian Village tribe

in Parcel 597-080-01. Just as the 1872 Act did not create any "undivided trust or restricted trust interest" in the Absentee-Shawnee tribe, the 1978 grant deed here did not, and could not, create any protected interest in a "tribe" that had yet to organize, had yet to adopt a constitution, had yet to be recognized, and had yet to exist in 1978. Moreover, there is no evidence that any protected interest in Parcel 597-080-01 was ever subsequently transferred to the Jamul Indian Village tribe. It therefore remains an abuse of discretion for the Ninth Circuit to have dismissed this action, where the BIA failed to make a Fed. R. Civ. P.12(b)(7) motion, let alone sustain its burden under Fed. R. Civ. P.19.

Similarly, here, until the BIA amends the grant deed to transfer the present designation of the individual Jamul Indian beneficiaries, to the subsequently recognized "tribe," the United States has failed to prove that the subsequently created "tribe" is either a necessary or indispensable party to this action.

The absence of any subsequently recorded transfer of the Petitioners' trust interest, also explains why the Ninth Circuit's reliance on its earlier decision in *Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088 (9th Cir. 1994), is erroneous. In *Pit River*, unlike here, there was a formal designation of the subsequently recognized "tribe" as the beneficiary of the grant deed, after the tribe was recognized. 30 F.3d at 1093. Here, the United States concedes in silence that there has been no such recorded transfer, amended grant deed, nor any formal designation of the Jamul Indian Village "tribe" as the beneficiary of the 1978 Daley grant deed, after the Village was recognized in 1981.

Here, there are no competing interests between the subsequently recognized "tribe" and the Petitioners who were designated individual trust beneficiaries, because the United States has conceded that the "tribe" did not exist when the Petitioners' designated interest was originally recorded in the 1978 deed, and there has been no subsequent transfer of any interest in the parcel to the tribe.

As was found in *Kansas v. Norton*, 249 F.3d 1213, 1226-27 (10th Cir. 2001):

> Thus, the absence of the Miami Tribe does not prevent the State from obtaining its requested relief or an adequate judgment. Nor do we believe the absence of the Tribe is likely to subject the parties to this action to multiple or inconsistent obligations..."

A "tribe" that did not exist in 1978 simply cannot be found to have acquired a "legally protected interest" in Parcel 597-080-01 when the grant deed was recorded in 1978, and any claim by the United States to the contrary is patently frivolous. *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992); *Davis v. United States*, 192 F.3d 951, 958-59 (10th Cir. 1999).

The United States has simply submitted no evidence that any amendment to the grant deed was ever recorded, transferring the individual Indian beneficiaries' designation to the subsequently created "tribe," after its recognition in 1981. Therefore, just as was found in *Potawatomi*:"In the absence of evidence showing the nature of the Absentee-Shawnee tribe's

interest in Potawatomi land, the BIA failed to sustain its burden with respect to its motion..." under Rule 19 here. Id., at 1294.

The Ninth Circuit's decision also conflicts with the Eighth and Tenth Circuits decisions by denying the Petitioners all rights and remedies pursuant to 25 U.S.C. 345, without any attempt to shape the equitable relief requested to avoid this prejudice. App. 3a. For example, the Eighth Circuit noted that a damages remedy could be shaped to avoid any potential infringement if any other non-party were found to be in possession of the allotment: "if it is determined that the United States wrongfully withheld a patent for an allotment, the government may be held liable for damages, regardless of the presence or absence of other potential parties." *Antoine*, 637 F.2d 1177, 1181.

"[T]he absence of an alternative forum [sh]ould weigh heavily, if not conclusively against dismissal." *Sac and Fox v. Norton*, 240 F.3d 1250, 1260 (10th Cir. 2001), citing, *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1413 (10th Cir. 1996). Even the Ninth Circuit has, on a prior occasion, conceded that courts should be "extra cautious" before dismissing an action pursuant to Rule 19, where "there does not appear to be any alternative forum in which plaintiffs' claims can be heard." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996).

Here, there was certainly no need to throw the baby out with the bath water and dismiss the Petitioners' entire action to protect any interest the United States perceives the tribe has in Parcel 597-080-01. Even if there had been a subsequent transfer of the

Petitioners' interest in the trust parcel to the tribe, as the Eighth Circuit held in *Antoine*, the Petitioners would remain equitably entitled to damages from the United States for the wrongful withholding of a patent for their original allotment in 1978, since such damages would not impair any subsequent interest the tribe allegedly acquired.

Ultimately in the remand of *Antoine*, the District Court awarded damages to prevent violation of the 5th Amendment's prohibition against the taking of private property without just compensation. The Eighth Circuit then affirmed the award of damages for the value of the allotment taken, plus an amount sufficient "to produce the present full equivalent of that value paid contemporaneously with the taking." *Antoine v. United States (II)*, 710 F.2d 477, 479-80 (8th Cir. 1983), citing this Court's opinion in *United States v. Creek Nation*, 295 U.S. 103, 111 (1935), and citing *Confederated Salish and Kootenai Tribes v. United States*, 401 F.2d 785 (Ct. Cl. 1968), *cert. denied*, 393 U.S. 1055 (1969), and *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119 (1938).

Individual Indians in the Ninth Circuit, including the Petitioners, should not be denied just compensation or any of the remedies provided by 25 U.S.C. 345 in the other circuits, just because their tribe was subsequently recognized after the United States acquired land in trust for their individual benefit in California, instead of the Dakotas.

II. CONCLUSION

The decision of the Ninth Circuit Court of Appeals conflicts with the Eighth and Tenth Circuit courts of appeals. As the Eighth and Tenth Circuits have held, a federally recognized Indian tribe is not, and should not be, a necessary and indispensable party to an action to enforce individual Indians' allotments under 25 U.S.C. 345.

More importantly, a false claim of sovereignty by a subsequently created I.R.A. tribe, should not be allowed to deprive individual Indians of all remedies provided by 25 U.S.C. 345.

As Felix Cohen, IBIA Chairman under President Roosevelt, and the primary draftsman of the Indian Reorganization Act, warned in 1953:

> "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith..." Cohen, Handbook of Federal Indian Law (DOI 1982) p. v.

Particularly in these times of great challenge to our distinctly American freedoms, the United States should not allow false claims of tribal sovereignty to take individual Indians' allotments without just compensation, lest our democratic faith fail these indigenous Americans.

For all of the foregoing reasons, since the "threshold requirements of Rule 19(a) have not been satisfied," as this Court decided in its *per curiam* opinion, *Temple v. Synthes Corporation, Ltd.*, 498 U.S. 5, 8 (1990), the writ of certiorari should be granted, the judgment of the Ninth Circuit Court of Appeals should be reversed, and the Petitioners' action should be remanded for trial.

Respectfully submitted

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(Any footnotes trail end of each document)

No. 02-55800

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER ROSALES; et al.,
Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA; et al.,
Defendants - Appellees.

July 8, 2003, Argued and Submitted,
Pasadena, California
August 11, 2003, Filed

COUNSEL: For WALTER ROSALES, MARIE TOGGERY, KAREN TOGGERY, Plaintiffs - Appellants: Patrick D. Webb, Esq., WEBB & CAREY, San Diego, CA.

For UNITED STATES OF AMERICA, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, NATIONAL INDIAN GAMING COMMISSION, Defendants - Appellees: M. Alice Thurston, Esq., Mark R. Haag, Esq., Katherine J. Barton, Esq., U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For UNITED STATES OF AMERICA, Defendant - Appellee: Appellate Section, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For UNITED STATES OF AMERICA, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, NATIONAL INDIAN GAMING COMMISSION, Defendants - Appellees: Robert H. Plaxico, AUSA, Peter John Sholl, Esq., USSD - OFFICE OF THE U.S. ATTORNEY, San Diego, CA.

JUDGES: Before: SILVERMAN, W. FLETCHER, and RAWLINSON, Circuit Judges.

OPINION: MEMORANDUM *

Plaintiffs-Appellants Walter Rosales et al., appeal from an order of the district court granting the United States' motion for summary judgment and dismissing their claims. Because we find that the Jamul Indian Village (the "Village") is a necessary and indispensable party pursuant to Fed. R. Civ. P. 19, we affirm the district court's order dismissing this action. Although the district court did not address whether the Village was a necessary and indispensable party, we have authority to address the issue on appeal. *See Pit River Home and Agric. Coop. Assoc. v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994).

The Village is a necessary party pursuant to Rule 19(a)(2)(i), which provides that an absent party is necessary if "the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may ... as a practical matter impair or impede the person's ability to protect that interest[.]" Fed. R. Civ. P. 19(a)(2)(i). The Village has claimed jurisdiction over the parcel of land at issue in this action since at least 1981.

This interest would be impaired if Appellants were declared to be the beneficial owners of the land.

The Village enjoys sovereign immunity from suit and cannot be forced to join this action without its consent. *See Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999). Furthermore, the United States is not an adequate representative of the Village's interests in this action because the United States cannot adequately represent the interests of one tribe in an intertribal dispute. *See Pit River*, 30 F.3d at 1101.

The Village is also an indispensable party pursuant to Rule 19(b), which requires the court to examine the following factors in order to determine whether this action should be dismissed: (1) prejudice to the absent party or those already parties; (2) the extent to which relief could be shaped to avoid prejudice; (3) adequacy of the judgment rendered without the absent party; and (4) whether plaintiff has another adequate remedy. *See* Fed. R. Civ. P. 19(b). The Village would be prejudiced if Appellants were granted beneficial ownership of the parcel of land, and relief cannot be shaped to avoid this prejudice. While Appellants do not appear to have another adequate remedy, "the tribe's interest in maintaining [its] sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *See American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) (citations omitted). For these reasons, the Village is a necessary and indispensable party, without whom this action cannot proceed.

AFFIRMED.

Footnotes

* This disposition is not appropriate for publication and may not be cited to by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

CASE NO. 01-951-IEG (JAH)

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF CALIFORNIA

WALTER ROSALES, MARIE TOGGERY, and KAREN TOGGERY,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.,
Defendants.

ORDER (1) CONSTRUING PLAINTIFFS' MOTION FOR A NEW TRIAL AS A MORTION FOR RECONSIDERATION; and (2) DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

[Doc. No. 37]

Presently before the Court is plaintiffs Walter Rosales, Marie Toggery, and Karen Toggery's ("plaintiffs") motion for new trial and relief from judgment. For the reasons discussed below, the Court construes plaintiffs' motion as a motion for reconsideration and denies plaintiffs' motion.

BACKGROUND

On May 30, 2001, plaintiffs Walter Rosales Marie Toggery, and Karen Toggery ("plaintiffs") filed a complaint far declaratory and injunctive relief pursuant to the Indian Reorganization Act of 1934. In their complaint, plaintiffs seek (1) a declaration of their

entitlement to the allotment of parcel number 597-080-01; (2) to compel defendants to issue to plaintiffs a trust patent for the above-mentioned parcel; (3) to enjoin defendants from further denying plaintiffs' entitlement to the parcel; (4) money damages for deprivation of the use and benefit of their parcel; and (5) reasonable attorneys' fees, costs, and expenses. In their complaint, plaintiffs allege that on February 5, 2001, the United States took action, and first published notice, denying plaintiffs' entitlement and excluding them from their allotment of land in parcel 597-08001." (Compl. at 6 ¶ 18.) This notice, attached to defendants' motion as Exhibit A, was issued by the Bureau of Indian Land Affairs pursuant to 25 C.F.R. §§ 151.10 and 151.11 and invited the public to comment on the pending application by the Jamul Indian Village Reservation for the United States to take certain parcels into trust for the benefit of the Reservation. The pending application does not include the parcel to which plaintiffs claim allotment rights, but plaintiffs allege that the publication of the notice apprised them of the government's failure to issue a patent to plaintiffs for an allotment to parcel 597-080-01. The leadership of the Jamul Reservation has been pursuing the trust application in an effort to commence gaming activities on tribal land. However, plaintiffs contend that they do not challenge the pending application for trust status of the potential gaming property but rather the government's failure to issue a patent to plaintiffs for an allotment on a separate piece of land, parcel 597-080-01.

On August 10, 2001, defendants filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 4(i), 8(a), 12(b)(2), and 12(b)(6), for failure to comply

with minimum federal pleading requirements, lack of personal jurisdiction, insufficient service of process, and failure to state a claim upon which relief may be granted. In their motion to dismiss, defendants also contended that the Doe defendants named by plaintiffs in their complaint were improper and should be dismissed. Plaintiffs filed an opposition to the motion on October 1, 2001. Defendants filed their reply on October 15, 2001. In their reply, defendants withdrew the portion of their motion to dismiss based on lack of personal jurisdiction and insufficient service of process under Rules 4(i), 12(b)(2), and 12(b)(5), in light of the additional information regarding service of the summons and complaint that plaintiffs attached to their opposition to defendants' motion. On October 16, 2001, the Court denied defendants' motion.

On November 9, 2001, defendants filed a motion to dismiss or, in the alternative, for judgment on the pleadings or summary judgment. In their motion, defendants contended that they were entitled to dismissal, judgment on the pleadings, or summary judgment on the basis that (1) the case is not ripe for adjudication; (2) plaintiffs lack standing; and (3) plaintiffs have not exhausted their administrative remedies. Defendants further contended in their motion that plaintiffs cannot claim allotment rights to parcel number 597-080-01 because this form of ownership was abolished in 1934. Finally, defendants argued in their motion that defendant National Indian Gaming Commission ("NIGC") is also entitled to dismissal, judgment on the pleadings or summary judgment because it does not play a role in determining whether land should be acquired by the United States in trust. In their opposition, plaintiffs contended that defendants

mischaracterized the nature of their claims. Plaintiffs emphasized that they are not challenging the application for trust status currently pending before the Bureau of Indian Affairs. Rather, plaintiffs argued that the gravamen of their complaint is that the government failed to issue them a patent for an allotment to parcel number 597-080-01, which was conveyed to the United States in trust in 1978. In support of plaintiffs' claim to this allotment, plaintiffs attached to their complaint the 1978 deed by which parcel number 597-080-01 was conveyed to the United States "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." (See Compl., Ex. B.)

In its order of February 14, 2002, the Court granted defendants' motion for summary judgment on the basis that plaintiffs had no individual rights to an allotment in parcel number 597080-01 because the deed to the United States provided that the United States would hold the land in trust for "such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." The Court found that this language referred to the Jamul tribe rather than to the half-blooded Jamul Indians then residing on the parcel. (See Summary Judgment Order at 13.) Thus, plaintiffs could not claim rights to land that was deeded in trust for the Jamul tribe as a whole. Rather, the Court found that plaintiffs' rights in parcel 597-080-01 were derivative of those of the tribe and that plaintiffs must pursue these rights through tribal government mechanisms. (See id. at 13-15.)

On February 22, 2002, plaintiffs filed the instant "motion for new trial and relief from judgment."

Defendants filed an opposition on March 25, 2002, and plaintiffs filed their reply on April 2, 2002. On April 8, 2002, the Court heard oral argument on plaintiffs' motion. The Court now turns to the merits of the motion.

DISCUSSION

I. Legal Standard for Motion for Reconsideration

A party may file a Rule 59(e) motion following a summary judgment order because it is considered a "judgment" within the meaning of Rule 54(a). See Fed. R. Civ. P. 54(a) (noting that a "judgment" includes "a decree and any order from which an appeal lies"). A notion to reconsider brought a s motion to amend or alter the judgment pursuant to Federal Rule of Civil Procedure 59(e) is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an "intervening change in controlling law." School Dist. No. IJ, Multnomah County v. AC and S, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

A Rule 59(e) motion, however, should not be used to relitigate old matters, raise new arguments, or present evidence that could have been raised prior to the court's entry of judgment. See Brown v. Wright, ht, 585 F.2d 708, 710 (9th Cir. 1978) (holding that a motion to amend is not to be used "to introduce evidence that was available at trial but was not proffered, to relitigate old issues, to advance new theories, or to secure a rehearing on the merits."); Simon v. United States, 891 F.2d 1154, 1159 (5th Cir. 1990) ("These [Rule 59]

motions cannot be used to raise arguments which could, and should, have been made before the judgment issued. Moreover, they cannot be used to argue a case under a new legal theory."); Savers Federal Sav. & Loan Ass'n v. Reetz, 888 F. 2d 1497, 1508-09 (5th Cir. 1989) (finding no abuse in denying a Rule 59(e) motion seeking to raise new reasons that summary judgment was inappropriate); Morales v. Quintiles Transnational Corp., 25 F. Supp. 2d 369, 372 (S.D.N.Y. 1998) (holding that a motion for reconsideration under Rule 59(e) "is not a substitute for appeal and 'may be granted only where the Court has overlooked matters or controlling decisions which might have materially influenced the earlier decision.") (citations omitted) (emphasis added).

In their moving papers, plaintiffs cite the standard for a new trial under Rule 59(a). However, a plain reading a Rule 59(a) indicates that it is not applicable. Rather, Rule 59(a) applies (1) "in an action in which there has been a trial by jury;" or (2) "in an action tried without a jury." Furthermore, the cases cited by plaintiffs in their discussion of the appropriate legal standard each involve motions brought subsequent to trial. In the instant case, there has not been a trial. Rather, plaintiffs seek reconsideration of the Court's order granting defendants' motion for summary judgment. Thus, the Court construes plaintiffs' motion as a motion for reconsideration brought under Rule 59(e). Applying the standard for Rule 59(e) motions, plaintiffs do not cite to any newly discovered evidence or "intervening change[s] in controlling law." See School Dist. No. IJ, Multnomah County AC and Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). Rather, plaintiffs' arguments for reconsideration appear to be that the Court committed clear error or that its decision was manifestly unjust.

See id. Thus, the Court applies this standard to plaintiffs' motion.

II. Analysis of Plaintiffs' Arguments for Reconsideration

A. Trust Patent Sought by Plaintiffs

Plaintiffs' first argument for reconsideration is that the Court misapprehended the form of relief sought by plaintiffs. Plaintiffs emphasize the Court's statement in the summary judgment order that "[i]t is unclear from plaintiffs' complaint and briefs whether they seek to compel the government to issue a fee patent or a trust patent." (See Summary Judgment Order at 13 n.3.) In the instant motion, plaintiffs emphasize that they "do not seek to hold fee simple title," but "merely wish to enforce their rights to have the Government hold title in trust for the express benefit of 'Jamul Indians of one-half degree or more Indian blood,' who were residing on the property in 1978 when the Government[ ] accepted the Daley grant deed." (See Pls.' Mem. P. & A. at 5.)

However, the Court found in its order granting defendants' motion far summary judgment that "[r]egardless of whether plaintiffs seek to compel the issuance of a fee or trust patent, it is clear that plaintiffs' claim fails on either basis in light of the 1978 deed's language designating the Tribe, rather than the individual plaintiffs, as the beneficiaries of parcel number 597-080-01." (See Summary Judgment Order at 13 n.) Thus, as the Court found in its previous order, plaintiffs are not entitled to any rights in parcel 597-080-01 independently of their rights as tribe members.fn1

B. Plaintiffs' Rights as a "Dependent Indian Community" Residing on Parcel Number 597-080-01

Plaintiffs also object to the Court's characterization of their claim as one seeking to enforce their individual rights in the parcel. Rather, plaintiffs contend that they are tenants in common with the other half-blooded Jamul Indians residing on the parcel when the United States took it into trust in 1975. Plaintiffs contend that they were members of a "dependent Indian community" for which the government accepted parcel number 597-080-01 into trust in 1978. In support of this proposition, plaintiffs cite to Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998) and United-States v McGowan, 302 U.S. 535 (1938). This "dependent Indian community," plaintiffs argue, was not a tribe in 1978 when the deed was executed; thus, the land could not have been accepted into trust for the benefit of the "tribe." Plaintiffs argue that the acceptance of the deed into trust did not "designate the tribe" and that the tribe could not have been recognized as such in 1975 because the Secretary did not approve its constitution until July 7, 1981.

Plaintiffs' use of the term "dependent Indian community" in this context is misplaced, however, as the term is relevant to federal criminal and civil jurisdiction over Indian lands, rather than forms of Indian ownership of land. See, e.g., Alaska v. Native Village of Venetie, 522 U.S. 520, 527 (1998) (holding that under 18 U.S.C. § 1151, "dependent Indian communities" refer to Indian lands that are neither reservations nor allotments but are subject to federal jurisdiction). Furthermore, Ninth Circuit case law indicates that the Secretary of the Interior uses

language such as that found in the 1975 deed to refer to tribes that have yet to be formed. For example, in Pit River Home and Agric. Coop. Ass'n v. United State, the Secretary of the Interior interpreted the language, "in trust for such Bands of the Pit River Indian of the State of California as shall be designated by the Secretary of the Interior" to mean that "the whole Pit River Indian Tribe or Nation when it has organized to include all elements of the Pit River Indians and has received Secretarial approval of the constitution adopted for this purpose should be designated the beneficial owner of the XL Ranch." 30 F.3d 1085, 1092-93 (9th Cir. 1994). Significantly, the Secretary did not interpret the above language to designate as beneficiaries only the bands of Pit River Indians then residing on the land.

Thus, applying the Secretary's interpretation of similar language from Pit River, it is clear that the 1975 deed's language designating as beneficiaries "such Jamul Indians of one-half degree or more blood as the Secretary of the Interior may designate" indicates the Secretary's intent to accept parcel number 597-080-01 into trust for the Jamul Tribe upon its recognition, rather than for the individuals, or the "dependent Indian community" then residing on the land. (See Compl., Ex. B.) As the Court found in its order granting defendants' notion for summary judgment, the Secretary's intent is further illustrated by the 1975 letter from the United States Department of the Interior, attached to defendants' reply as Exhibit L, which notes that, as of March 15, 1978, the Department of the Interior "ha[d] received eleven signatures out of the thirteen ½ bloods for the Bureau of Indian Affairs to proceed with the proposed acquisition through a

donation to establish the Jamul Indian Reservation." (See Summary Judgment Order at 14 (citing Defs.' Ex. L).) Thus, plaintiffs' argument that the Court erred by failing to recognize the "dependent Indian community" comprised of the Jamul Indians residing on parcel 597-080-01 as the beneficiaries of the 1978 trust deed lacks merit.

C. Genuine Issue of Material Fact as to whether There Was a Recognized Tribe When the United States Accepted Parcel Number 597-080-01 into Trust in 1978

Finally, plaintiffs argue that there is a genuine issue of material fact as to whether the Secretary of the Interior had recognized the Jamul Tribe when the United States accepted parcel number 597-080-01 into trust in 1978. Plaintiffs cite to Native Village of Tyonek v. Puckett, 957 F.2d 631, 634-35 (9th Cir. 1992) for the proposition that the Court is required to make express factual findings to determine that a Jamul tribe existed in 1975. However, Puckett involved the issue of "whether any Alaskan native village constitutes an Indian tribe for the purpose of sovereign immunity." 1d. at 635. Furthermore, the Court need not determine whether there is a Jamul Tribe; it need only find, as it did in the summary judgment order, that there is no genuine issue of material fact that the 1978 deed did not grant plaintiffs any rights in parcel 597-080-01 other than as members of the anticipated Jamul Tribe.

Plaintiffs' argument that the Court must make specific factual findings as to whether a tribe existed in 1978 is misplaced, as the deed language conveyed the parcel in trust for the anticipated Jamul Tribe. Plaintiffs cite to no authority showing that the United States is

unauthorized to accept land into trust for a tribe prior to its formal recognition by the Secretary of the Interior. Plaintiffs do not dispute that upon the Secretary's approval of the Jamul Tribe's constitution in 1981, the Jamul Indians became a "tribe." Thus, plaintiffs' argument requires the Court to find that the Secretary is prohibited from conveying land in trust to a tribe prior to its formal recognition by the Secretary of the Interior. The Court is aware of no authority for such a proposition. To the contrary, the Secretary of the Interior has specifically concluded that conveyances into trust for tribes that have yet to be designated are effective transfers intended to benefit the tribe as a whole upon its recognition.fn2 See, e.g., Pit River, 30 F.3d at 1092-93. Thus, the Court finds no clear error or manifest justice in its determination that the language of the 1975 deed conveying parcel number 597-080-01 into trust for "such Jamul Indians of one-half degree or more blood as the Secretary of the Interior may designate" refers to the Jamul Tribe rather than the individual Jamul Indians then residing on the parcel.fn3

CONCLUSION

For the foregoing reasons, the Court construes plaintiffs' "motion for a new trial" as a Rule 59(e) motion for reconsideration. The Court further finds that plaintiffs have failed to show that the Court's order granting defendants' motion for summary judgment contained "clear error" or was "manifestly unjust." The Court finds no other basis for reconsideration. Thus, the Court DENIES plaintiffs' motion for reconsideration.

IT IS SO ORDERED.

IRMA E. GONZALEZ
United States District Judge

Dated: 4/22/02

cc: Magistrate Judge Houston
all parties

Footnotes

fn1 Plaintiffs also argue in their reply that there is no requirement that individual Indians for whom the United States accepts land into trust must be members of a tribe. Pls.' Reply at 6.) However, the Court acknowledged that under section 465, land could be taken into trust for individual Indians. (See Summary Judgment Order at 10.) The Court determined defendants were entitled to summary judgment on the basis that the 1975 conclusively established that the United States did not take the parcel into trust for individual Indians but for the anticipated Jamul Tribe as a whole. (See id. at 12-14.)

fn2 The government also emphasizes that under 5 U.S.C. § 476, an Indian group could organize and adopt a constitution only if the group is an "Indian tribe" -- defined under section 479 as "the Indians residing on one reservation" or under section 479a(2) as any "tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." See 25 U.S.C. §§ 476, 479. Thus, the government contends, parcel number 597-480-01 was part of the "reservation" prior to 1951 because the Jamul Indian could have their constitution approved by the Secretary only if they were residing on a

"reservation" as a tribe. This argument forms an alternative basis for the Court's finding that plaintiffs have no rights in parcel number 597-080-01 other than through normal tribal government mechanisms. See F. Cohen, Handbook of Federal Indian Law, at 472 (1982 ed.) ("The manner in which a tribe chooses to use its property can be controlled by individual tribe members only to the extent that the members participate in the governmental processes of the tribe.").

fn3 The Court also rejects plaintiffs' suggestion that the Secretary was required to "initiate designation proceedings" subsequent to its acceptance of parcel number 597-084-41 into trust. Courts have recognized under similar circumstances that "it [is] not necessary that the designation be made by a formal proclamation." Coast-Indian Cmty v. United States, 550 F. 2d 639, 643 (Ct. I. 1977). Rather, "designation may be inferred by law." Id. at 644. Here, the Court finds that the Secretary's recognition of the Jamul Tribe's constitution in 1981 accomplished such designation in light of the intent reflected in the 1978 deed.

NOT FOR PUBLICATION

No. 02-55800

D.C. No. CV-01-00951-IEG
Southern District of California,
San Diego

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER ROSALES; MARIE TOGGERY;
KAREN TOGGERY,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; U.S.
DEPARTMENT OF THE INTERIOR; BUREAU
OF INDIAN AFFAIRS; NATIONAL INDIAN
GAMING COMMISSION,
Defendants-Appellees.

Filed: September 19, 2003

ORDER

Before: SILVERMAN, W. FLETCHER, and RALWINSON, Circuit Judges.

Appellants' Petition for Rehearing filed on August 27, 2003, is DENIED.

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

25 U.S.C. 345. Actions for allotments

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court [district court] of the United States; and said circuit courts [district courts] are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now [Aug. 15, 1894] held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases.

Fed. R. Civ. P., Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial

to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

Supreme Court, U.S.
FILED
FEB 2 0 2004
CLERK

No. 03-895

In the Supreme Court of the United States

WALTER ROSALES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioners' claim to beneficial ownership of land that the United States claims to hold in trust as the reservation of the Jamul Indian Village, a federally recognized Indian Tribe, is barred because the Village is an indispensable party.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The opinion of the district court (App., *infra*, 1a-21a) is unreported.[1] The opinion of the district court denying petitioners' motion for reconsideration (Pet. App. 5a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2003. A petition for rehearing was denied on September 19, 2003 (Pet. App. 18a). The petition for a writ of certiorari was filed on December 18, 2003. The

[1] The district court's opinion, which was omitted from petitioners' appendix, is appended to this brief.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Walter Rosales, et al., claim that the grant of 4.66 acres of land (the Parcel) to the United States "in trust for such Jamul Indians as the Secretary may designate" constituted an "allotment" of the land to them, so that the land is owned by them as individual Jamul Indians rather than by the Jamul Indian Village (Village), a federally recognized Tribe. The district court granted summary judgment for the United States because, *inter alia*, the Village, rather than petitioners, is the beneficial owner of the Parcel. App., *infra*, 19a-20a. The court of appeals affirmed on the ground that the Village is an indispensable party under Federal Rule of Civil Procedure 19. Pet. App. 1a-4a.

1. a. In 1887, Congress enacted the Indian General Allotment Act (also known as the Dawes Act), ch. 119, 24 Stat. 388 (25 U.S.C. 331 *et seq.*), which empowered the President to allot tribal lands to individual Indians. Under the General Allotment Act, a parcel was allotted and to be held in trust for 25 years, after which time a fee patent would issue to the Indian allottee, who could then sell it to non-Indians. 25 U.S.C. 348; see generally *United States* v. *Mitchell*, 445 U.S. 535, 543-544 (1980).

The General Allotment Act and subsequent amendments provided for allotments from several sources. Section 1 authorized the President to make allotments to individual Indians from Indian reservation lands. 25 U.S.C. 331 (1994), repealed by Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, Tit. I, § 106(a)(1), 114 Stat. 2007. Section 4 permitted Indians not residing on a reservation to settle on "any surveyed or unsurveyed lands of the United States not

otherwise appropriated"—in other words, public domain land—and to have the land allotted to them in the same manner as reservation land could be allotted. 25 U.S.C. 334. Subsequent amendments authorized the Secretary of the Interior to make allotments within national forests to certain Indians occupying such land. 25 U.S.C. 337.

The process of patenting an allotment to an Indian occurred in two steps. Upon approving an allotment, the Secretary issued a trust patent, declaring that the United States held the allotted land in trust for 25 years for the sole use and benefit of the Indian to whom the allotment was made, or his successors. 25 U.S.C. 348. At the expiration of the trust period, the Secretary conveyed a fee patent for the allotment to the Indian owner. 25 U.S.C. 348.

b. In 1934, Congress repudiated the practice of allotment with the enactment of the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*). See *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 650 n.1 (2001); *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992). The IRA halted further allotments of Indian reservation lands and extended indefinitely the period during which allotments would be held in trust by the United States. See 25 U.S.C. 461, 462; *County of Yakima*, 502 U.S. at 255.

The IRA also authorized the Secretary of the Interior, at his or her discretion, to acquire interests in land, including by gift, "for the purpose of providing land for Indians." § 5, 25 U.S.C. 465. Such lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." § 5, 25 U.S.C. 465. The Secretary of the Interior is authorized to proclaim new Indian reservations

on lands acquired under this provision. § 7, 25 U.S.C. 467.

In addition, Section 16 of the IRA allowed certain Indians living on the same reservation to organize and form a Tribe. 48 Stat. 987, codified as amended at 25 U.S.C. 476. Section 19 of the Act defines the term "tribe" to refer to "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. 479. "Indian" is defined to include, *inter alia*, "persons of one-half or more Indian blood." 25 U.S.C. 479.

2. a. The Jamul Indian Village is a small Indian Tribe located in Jamul, California, east of San Diego. Prior to the events at issue in this case, the Jamul Indians resided on private property owned by Lawrence and Donald Daley. The property was adjacent to an Indian graveyard encompassing 2.21 acres, which was owned by the Roman Catholic Bishop of Monterey and Los Angeles. C.A. E.R. 12.

b. During the 1970s, representatives of the Jamul Indian Village contacted the Bureau of Indian Affairs (BIA), an agency of the Department of the Interior, about obtaining federal recognition as an Indian Tribe. C.A. E.R. 284. BIA explained that the Village could seek recognition as a half-blood Indian community, living on the same reservation, pursuant to Sections 16 and 19 of the Indian Reorganization Act, 25 U.S.C. 476 and 479. C.A. E.R. 284-285. The Village decided to pursue that option and, on March 15, 1978, BIA notified the Jamul Indians that it had received a sufficient number of signatures of half-blood Jamul Indians "to proceed with the proposed acquisition through a donation to establish the Jamul Indian Reservation." App., *infra*, 20a; C.A. E.R. 128. On December 12, 1978, the Secretary of the Interior acquired, by gift from the

Daleys, the 4.66 acres on which the Jamul Indians resided. The grant deed conveyed the Parcel to

> [t]he United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate.

App., *infra*, 19a.

c. On May 9, 1981, the half-blood members of the Jamul Indian Village ratified a constitution, which formally established the Jamul Indian Village, governed by a tribal council. C.A. E.R. 410-419; see also *Rosales* v. *Sacramento Area Director, Bureau of Indian Affairs*, 32 I.B.I.A. 158, 160 (1998). Among other things, the constitution provided for tribal jurisdiction over all lands within the Village and granted the tribal council power to prevent the sale, disposition, lease or encumbrance of tribal lands and to administer tribal assets. C.A. E.R. 410, 414. The constitution was approved by the Department of the Interior on July 7, 1981. *Id.* at 420; *Rosales*, 32 I.B.I.A. at 159 ("Village was organized in 1981 under the Indian Reorganization Act."). On November 24, 1982, the Secretary of the Interior included the Jamul Indian Village on the list of federally recognized Tribes published in the *Federal Register*. 47 Fed. Reg. 53,132 (1982).[2] Petitioners do

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[2] During the 1990s, disputes arose about tribal membership and leadership in the Jamul Indian Village. Walter Rosales and Karen Toggery brought several administrative appeals to the Interior Board of Indian Appeals (IBIA) raising such issues. See *Rosales* v. *Pacific Reg'l Director, Bureau of Indian Affairs*, 39 I.B.I.A. 12 (2003); *County of San Diego* v. *Pacific Reg'l Director, Bureau of Indian Affairs*, 37 I.B.I.A. 233 (2002); *Rosales* v. *Sacramento Area Director, Bureau of Indian Affairs*, 34 I.B.I.A. 125 (1999); *Rosales* v. *Sacramento Area Director, Bureau of Indian Affairs*, 34

not dispute that the Jamul Indian Village is a federally recognized Tribe. Pet. 5.

d. On February 5, 2001, BIA provided notice that the Jamul Indian Village had applied to have the United States acquire approximately 101 acres of property in trust for the Village. App., *infra*, 2a; C.A. E.R. 83-97; see also 67 Fed. Reg. 15,582 (2002). The accompanying application detailed the need for the land for purposes of housing, economic development, and other community needs. C.A. E.R. 87-88. The application explained that the Tribe planned to construct a casino/resort development on its existing property, and that the fifteen existing home sites on the Reservation would need to be moved to the newly acquired land. *Id.* at 88.

3. On May 30, 2001, petitioners filed a complaint for declaratory and injunctive relief against the United States and various federal agencies. The complaint alleged that upon the United States' acquisition of the Parcel, petitioners became entitled to it as an allotment under the IRA and the General Allotment Act of 1887.

I.B.I.A. 50 (1999); *Rosales* v. *Sacramento Area Director, Bureau of Indian Affairs*, 32 I.B.I.A. 158 (1998). Petitioners have sought district court review of some of those rulings in *Rosales* v. *United States*, No. 1:03CV01117 (D.D.C. filed May 23, 2003). Other federal court challenges to tribal leadership and gaming plans brought by Rosales or other Jamul Indians represented by Rosales' counsel in this case include *Jamul Indian Village* v. *Hunter*, No. 3:95CV00131 (S.D. Cal. voluntarily dismissed Sept. 30, 1996); *Rosales v. Townsend*, No. 3:97CV00769 (S.D. Cal. voluntarily dismissed Nov. 11, 1998); *Rosales* v. *United States*, No. 1:98-CV-00860-DGS (Fed. Cl. stayed Apr. 19, 2000); *Rosales* v. *Kean Argovitz Resorts, Inc.*, No. 3:00CV01910 (S.D. Cal. dismissed Apr. 18, 2001), aff'd, 35 Fed. Appx. 562 (9th Cir. 2002) (unpublished), cert. denied, 123 S. Ct. 437 (2002). All of those cases have been either stayed or voluntarily dismissed.

App., *infra*, 1a-2a. The complaint alleged that the United States' February 5, 2001, publication of the notice proposing to take additional land into trust for the Village, in order to allow a casino to be built on the Parcel, illegally denied and excluded petitioners from their claimed allotment. C.A. E.R. 14, 15. Petitioners sought an order: (1) declaring that they became entitled to an allotment of the Parcel at the time the deed to the United States was recorded in 1978; (2) compelling the United States to issue them trust patents for the Parcel; (3) enjoining the United States from denying or excluding them from the Parcel; (4) declaring the United States liable for money damages for depriving them of use and benefit of the Parcel; and (5) awarding attorney's fees and costs. App., *infra*, 2a.

4. On February 14, 2002, the district court granted the United States' motion for summary judgment. The district court first determined that petitioners' claim to fee ownership of the Parcel was not ripe because, under the General Allotment Act, the United States could convey land to an individual Indian in fee only after first holding the land in trust for 25 years. Because the Parcel was not taken into trust until 1978, petitioners would not be able to obtain a fee patent until at least 2003. In any event, the district court concluded that the General Allotment Act was limited by the IRA, which extended indefinitely the 25-year trust period, thus precluding petitioners from obtaining a fee patent for the Parcel. App., *infra*, 15a-17a.

In the alternative, the district court held that, even if the General Allotment Act was not modified by the IRA, its provisions did not apply to the Parcel, because the Parcel was accepted into trust pursuant to 25 U.S.C. 465, and was not allotted pursuant to the General Allotment Act, 25 U.S.C. 331 *et seq.* The district

court concluded that Section 465 made no provision for the issuance of a fee patent for trust land to Indians. App., *infra*, 17a-19a. Finally, the district court held that the language of the 1978 deed clearly conveyed the Parcel in trust to the United States for the benefit of the Jamul Indian Village as a whole, not for specific individual Indians. *Id.* at 19a-20a.

The district court denied petitioners' motion for reconsideration, concluding that the Parcel is held in trust for the Village, not petitioners as individuals; that petitioners' claim to be a dependent Indian community (apparently distinct from the federally recognized Village) was without merit; and that the fact that the Village was not formally recognized as a Tribe by the United States until after the Parcel was donated was immaterial because the Secretary may take land into trust for a Tribe before it is formally organized. Pet. App. 11a-15a.

5. In an unpublished decision, the court of appeals affirmed the district court's judgment on different grounds, holding that the Village is an indispensable party to the action under Rule 19 of the Federal Rules of Civil Procedure. The court of appeals first concluded that the Village is a necessary party because the Village claimed jurisdiction over the Parcel and its interests would be impaired if petitioners were declared to be the beneficial owners. Pet. App. 2a-3a. The court determined that the United States is not an adequate representative of the Village's interests in the action because, under Ninth Circuit precedent, the United States could not adequately represent one Tribe against another in an intertribal dispute. *Id.* at 3a.[3] The

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[3] Although the dispute here is between a Tribe and individual Indians rather than between two Tribes, the court of appeals ap-

court of appeals then concluded that the Village could not be joined because it enjoys sovereign immunity from suit, and that the Village is an indispensable party because (i) relief could not be shaped to avoid prejudice to the Village's interest in the Parcel, and (ii) the Village's interest in maintaining its sovereign immunity outweighs petitioners' interest in litigating their claims. *Ibid.*

ARGUMENT

The unpublished decision of the court of appeals does not warrant review by this Court.

Petitioners seek review on the question whether a federally recognized Indian Tribe is a necessary and indispensable party to an action by an individual Indian seeking an allotment pursuant to 25 U.S.C. 345. Pet. i. The presentation of that question rests on an incorrect premise, for petitioners' action does not properly arise under 25 U.S.C. 345. This is, rather, a suit challenging the nature of the United States' title to the Parcel, because petitioners contend that the United States is erroneously holding the Parcel in trust for the Jamul Indian Village. Such a suit is governed by the Quiet Title Act (QTA), 28 U.S.C. 2409a, but is barred by the QTA's exception for Indian trust lands. Even putting that threshold jurisdictional obstacle to one side, however, the court of appeals' decision does not conflict with the decision of any other court of appeals or present any issue of general importance warranting further review.

1. As an initial matter, review is not warranted to consider the rule of law petitioners now advocate be-

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parently concluded that it poses the same type of potential conflict in that the Tribe and petitioners each claim that the United States holds the Parcel in trust for them.

cause petitioners failed to raise that issue in the courts below. In the court of appeals, petitioners did not dispute that a Tribe *could* be an indispensable party to an action brought under 25 U.S.C. 345, but only that, under the facts of this case, the Jamul Village *is not* an indispensable party. Specifically, petitioners did not argue below, as they do now (Pet. 12), that the court of appeals should have followed *Antoine* v. *United States*, 637 F.2d 1177, 1181 (8th Cir. 1981), which concluded that "determining whether an Indian should have received a patent for an allotment of land under section 345 requires the presence of no party other than the United States." Nor did they argue, as they do in their petition (Pet. 17-18), that the court could avoid implicating the Village's interests in the Parcel by awarding petitioners damages rather than the Parcel itself. Rather, petitioners argued only that the Village did not have or claim a legally protected interest in the Parcel, that the United States could adequately represent the Village's interests, and that there was no other forum in which petitioners could bring their claim. See Appellants' Reply Brief 26-30. Where an issue is neither raised before nor considered by the court of appeals, this Court ordinarily will not consider it. *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

2. Moreover, the question whether there can be an indispensable party in an action against the United States to enforce an asserted right to an allotment under 25 U.S.C. 345 is not properly presented in this case because petitioners' assertion that this suit arises under 25 U.S.C. 345 is without merit. Section 345 authorizes suits claiming the right "to an allotment of land under any law or treaty." It waives the United

States' sovereign immunity only for "suits seeking the issuance of an allotment." *United States* v. *Mottaz*, 476 U.S. 834, 845 (1986); see also *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 142 (1972) ("Section 345 authorizes, and provides governmental consent for, only actions for allotment.").

The Parcel is not an "allotment" subject to 25 U.S.C. 345. "Allotment is a term of art" that pertains to "a selection of specific land awarded to an individual allottee from a common holding." *Affiliated Ute Citizens*, 406 U.S. at 142. Specifically, the General Allotment Act provided for allotments to be made from three types of land: Indian reservations (25 U.S.C. 331, repealed by 25 U.S.C. 461); public domain land (25 U.S.C. 334); and national forests (25 U.S.C. 337). Here, petitioners do not claim a right to an allotment out of reservation, public domain, or national forest land. Rather, they claim that the donation of *private land* to the United States in trust for such Jamul Indians as the Secretary may designate constituted an allotment of the Parcel to them, and that the Secretary therefore was required to issue trust patents to them. Pet. 6. Further, petitioners do not cite any "law or treaty" that provides for their asserted right to allotment of the Parcel, a necessary predicate for an action against the United States under 25 U.S.C. 345. Petitioners' claim amounts to nothing more than a claim that the terms of the deed conveying the Parcel to the United States granted them individual rights to beneficial ownership of the Parcel, a claim that is not covered by Section 345.

Nor do petitioners make a claim "for" an original allotment, which is the only type of claim for which Section 345 waives the United States' sovereign immunity. See *Mottaz*, 476 U.S. at 846. Rather, petitioners claim (Pet. 9) that the United States wrongfully deprived

them of land that they assert has *already* been allotted to them (apparently by operation of law), when it was conveyed to the United States in 1978. Specifically, petitioners claim that the United States wrongfully excluded them from their purported allotments in February 2001 when it published notice of the proposal to take additional land into trust for the Village. In *Mottaz*, however, this Court ruled that 25 U.S.C. 345 does not waive the United States' immunity to suit for the same sort of claim, in which an Indian plaintiff alleged that the United States illegally sold to a third party land that previously had been allotted to her. 476 U.S. at 847-848.

Indeed, petitioners' claim amounts to nothing more than a quiet title action, which is barred by the Indian trust lands exception to the Quiet Title Act, 28 U.S.C 2409a. See *Mottaz*, 476 U.S. at 847-848 (party cannot avoid limitations in QTA by invoking 25 U.S.C. 345 to bring quiet title action against the government). The QTA waives the United States' sovereign immunity for civil actions "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a). The QTA provides the "exclusive means by which adverse claimants may challenge the United States' title to real property." *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983). The QTA, however, expressly "does not apply to trust or restricted Indian lands," 28 U.S.C. 2409a(a), and thus bars suits against the United States in which the plaintiff claims title to lands held in trust for Indians. *Mottaz*, 476 U.S. at 842. By virtue of that exception, if the United States claims an interest in real property based on its status as trust lands, the QTA does not waive the government's sovereign immunity. *Id.* at 843. Here, the United States claims to hold the Parcel in trust for the Jamul Indian

Village. It follows, under *Mottaz*, that petitioners' claim to title in that land is barred by the QTA.[4] This threshold jurisdictional obstacle to petitioners' suit renders the indispensable party issue irrelevant, and renders this an unsuitable vehicle for considering the indispensable party issue.

3. Quite aside from the jurisdictional bar, this case does not warrant review. The court of appeals' decision does not conflict with decisions of other courts of appeals. Contrary to petitioners' assertion, the court of appeals did not hold that an Indian Tribe is always an indispensable party under Rule 19 in an allotment action brought pursuant to 25 U.S.C. 345. Indeed, the court of appeals did not even cite 25 U.S.C. 345, or suggest that petitioners' suit properly arises under that provision. Rather, the court of appeals simply held that, under the specific facts of this case, the Village is an indispensable party. Pet. App. 2a-3a. The cases that petitioners claim conflict with this holding are factually and legally distinguishable.

First, the court of appeals' decision does not conflict with *Antoine* v. *United States*, 637 F.2d 1177 (8th Cir. 1981). *Antoine* involved the claim of an individual Sioux Indian to a true "allotment" of land from the Sioux Indian Reservation pursuant to a treaty and the Sioux Allotment Act. *Id.* at 1178-1179. The United States had allotted the land in question to another Indian, and the land had subsequently passed into the possession of private parties. *Id.* at 1181; see also *Antoine* v. *United*

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[4] The United States argued in the court of appeals that petitioners' claim was not a claim for an allotment but rather was a quiet title action barred by the Indian trust lands exception to the QTA. See Appellee's Br. 18-30. The court of appeals, however, did not address that threshold question.

States, 710 F.2d 477, 478-479 (8th Cir. 1983). The court of appeals rejected the United States' contention that the person or persons currently in possession of the tract were indispensable parties, because it viewed the United States, "as the allotting agent," to be the "appropriate defendant," and concluded that the absence of the parties in possession of the claimed allotment did not "preclude[] *all relief* in this case." *Antoine*, 637 F.2d at 1181 (emphasis added). Although the court recognized that it could not order a return of the allotted land unless the persons currently in possession were allowed to join as parties, it determined that the government could nevertheless be held liable for damages in their absence. *Id.* at 1181-1182. The court viewed the plaintiff's complaint as seeking "to recover possession *or* damages" for the government's failure to issue a patent. *Id.* at 1178.[5]

In the instant case, petitioners claim ownership not of an allotment from public land or a common holding, as claimed by plaintiff in *Antoine*, but of formerly *private* land granted by private parties to the United States to be held in trust for unspecified Jamul Indians to be designated by the Secretary. The United States therefore is not an "allotting agent," as it was in *Antoine*, but rather the grantee of the legal title of the land. Petitioners have not sought damages as an alternative to

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[5] The opinion's description of the relief sought in the complaint does not appear to support the court's conclusion that the plaintiff had requested damages as an alternative to the land itself, although the plaintiff had sought as alternative relief the grant of another tract of equal size. *Antoine*, 637 F.2d at 1181. On remand, the plaintiff did specifically request damages as an alternative to a declaration of title to the land itself. *Antoine* v. *United States*, 537 F. Supp. 1163, 1167 (D.S.D. 1982), aff'd in part and vacated in part, 710 F.2d 477 (8th Cir. 1983).

recovering possession of the Parcel, and they continue in this Court to "seek a declaration of their rights to their allotment" and to enjoin the United States from "denying, and otherwise excluding the Petitioners from, their allotment in, and designation as trust beneficiaries of," the Parcel. Pet. 10. Thus, the circumstances that led the *Antoine* court to conclude that the persons in possession of the property at issue in that case were not indispensable parties are absent in this case. Moreover, under *Mottaz*, 476 U.S. at 845-846 & n.9, there is a serious question whether Section 345 waives the United States' sovereign immunity and creates a cause of action in the circumstances of a case like *Antoine*, and Section 345 does not in any event contain the necessary unambiguous waiver of sovereign immunity to a suit for money damages.

The court of appeals' decision also does not conflict with *Citizen Band Potawatomi Indian Tribe of Oklahoma* v. *Collier*, 17 F.3d 1292 (10th Cir. 1994). In *Potawatomi*, the court of appeals held that the Absentee-Shawnee Tribe was not an indispensable party to a suit in which the Potawatomi Tribe sought a declaration that allotments could be made from its reservation to individual Absentee-Shawnee Indians only with the Potawatomi Tribe's consent. *Id.* at 1293-1294. The court's holding rested on its determination that the prospect that individual Absentee-Shawnee Indians might seek an allotment from the reservation gave the Absentee-Shawnee *Tribe* no claim to a present interest in the reservation land. *Ibid.* Rather, the court concluded that the Absentee-Shawnee Tribe had "merely an expectation" that the United States would consider allotment applications from its members. *Id.* at 1294. In this case, by contrast, the court of appeals expressly found that "[t]he Village has claimed jurisdiction over

the parcel of land at issue in this action since at least 1981" (Pet. App. 2a), and therefore claims a present interest in the Parcel.

4. In the end, the court of appeals' decision simply represents an application of Rule 19 to the particular facts of this case. As this Court has recognized, the question "[w]hether a [party] is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that [party], can only be determined in the context of particular litigation." *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 118 (1968). In this case, the court of appeals concluded that the Village is a "necessary" party under Rule 19(a)(2)(i) because the Village claims an interest in the Parcel. Pet. App. 2a-3a. Because the Village enjoys sovereign immunity from suit and therefore could not be joined as a defendant, *Kiowa Tribe of Oklahoma* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998), the court of appeals then considered whether the Village is an "indispensable" party under Rule 19(b). Pet. App. 3a. The court of appeals applied the four factors noted in Rule 19(b) and concluded that the possible prejudice to the Village counseled in favor of dismissal of the action. *Ibid.* That fact-specific determination does not warrant this Court's review and presents no occasion for the Court to consider broader issues of when an Indian Tribe should be regarded as an indispensable party in a suit against the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2004

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 01-951-IEG(JAH)
[Doc. No. 17]

WALTER ROSALES, MARIE TOGGERY,
AND KAREN TOGGERY, PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: Feb. 14, 2002

ORDER (1) GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; AND (2) DENYING DEFENDANTS' MOTION TO DISMISS OR FOR JUDGMENT ON THE PLEADINGS

Presently before the Court is defendants United States, Department of the Interior, Bureau of Indian Affairs, and National Indian Gaming Commission's (collectively referred to as "defendants") motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h) or, in the alternative, for judgment on the pleadings under Rule 12(c) or summary judgment under Rule 56. For the reasons discussed below, the Court grants defendants' motion for summary judgment.

BACKGROUND

On May 30, 2001, plaintiffs Walter Rosales, Marie Toggery, and Karen Toggery ("plaintiffs") filed a complaint for declaratory and injunctive relief pursuant to the Indian Reorganization Act of 1934. In their complaint, plaintiffs seek (1) a declaration of plaintiffs' entitlement to the allotment of parcel number 597-080-01; (2) to compel defendants to issue to plaintiffs a trust patent for the above-mentioned parcel; (3) to enjoin defendants from further denying plaintiffs' entitlement to the parcel; (4) money damages for deprivation of the use and benefit of their parcel; and (5) reasonable attorneys' fees, costs, and expenses. In their complaint, plaintiffs allege that "on February 5, 2001, the United States took action, and first published notice, denying plaintiffs' entitlement and excluding them from their allotment of land in parcel 597-080-01." (Compl. at 6 ¶ 18.) This notice, attached to defendants' motion as Exhibit A, was issued by the Bureau of Indian Land Affairs pursuant to 25 C.F.R. §§ 151.10 and 151.11 and invited the public to comment on the pending application by the Jamul Indian Village Reservation for the United States to take certain parcels into trust for the benefit of the Reservation. The pending application does not include the parcel to which plaintiffs claim allotment rights, but plaintiffs allege that the publication of the notice apprised them of the government's failure to issue a patent to plaintiffs for an allotment to parcel 597-080-01. The leadership of the Jamul Reservation has been pursuing the trust application in an effort to commence gaming activities on tribal land. However, plaintiffs contend that they do not challenge the pending application for trust status of the potential gaming property but rather the government's

failure to issue a patent to plaintiffs for an allotment on a separate piece of land, parcel 597-080-01.

On August 10, 2001, defendants filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 4(i), 8(a), 12(b)(2), and 12(b)(6), for failure to comply with minimum federal pleading requirements, lack of personal jurisdiction, insufficient service of process, and failure to state a claim upon which relief may be granted. In their motion to dismiss, defendants also contended that the Doe defendants named by plaintiffs in their complaint are improper and should be dismissed. Plaintiffs filed an opposition to the motion on October 1, 2001. Defendants filed their reply on October 15, 2001. In their reply, defendants withdrew the portion of their motion to dismiss based on lack of personal jurisdiction and insufficient service of process under Rules 4(i), 12(b)(2), and 12(b)(5), in light of the additional information regarding service of the summons and complaint that plaintiffs attached to their opposition to defendants' motion. On October 16, 2001, the Court denied defendants' motion.

On November 9, 2001, defendants filed the instant motion to dismiss or, in the alternative, for judgment on the pleadings or summary judgment. In their motion, defendants contend that they are entitled to dismissal, judgment on the pleadings, or summary judgment on the basis that (1) the case is not ripe for adjudication; (2) plaintiffs lack standing; and (3) plaintiffs have not exhausted their administrative remedies. Defendants further contend in their motion that plaintiffs cannot claim allotment rights to parcel number 597-080-01 because such ownership was abolished in 1934. Finally, defendants argue in their motion that defendant National Indian Gaming Commission ("NIGC") is also

entitled to dismissal, judgment on the pleadings or summary judgment because it does not play a role in determining whether land should be acquired by the United States in trust. In their opposition, plaintiffs contend that defendants mischaracterized the nature of their claims. Plaintiffs emphasize that they are not challenging the application for trust status currently pending before the Bureau of Indian Affairs. Rather, plaintiffs contend that the gravamen of their complaint is that the government failed to issue them a patent for an allotment to parcel number 597-080-01, which was conveyed to the United States in trust in 1978. In support of plaintiffs' claim to this allotment, plaintiffs attach to their complaint the 1978 deed by which parcel number 597-080-01 was conveyed to the United States "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." (*See* Compl., Ex. B.)

Responding to plaintiffs' recharacterization of their claim, defendants contend in their reply that plaintiffs' argument that they are entitled to a patent for their allotment to parcel number 597-080-01 lacks merit because Congress abolished the allotment form of ownership in 1934. Here, the United States took parcel number 597-080-01 into trust pursuant to 25 U.S.C. § 465. (*See* Compl., Ex. B.) Defendants emphasize that, unlike land that was allotted prior to 1934 under the General Allotment Act, land held in trust pursuant to § 465 does not become allotted land but rather land owned by the United States for the benefit of tribes. Defendants also contend that no other allotment statute applies to the facts of this case. Thus, plaintiffs are not entitled to the issuance of a patent for parcel number 597-080-01 because the land was taken into trust by the

United States for the benefit of the Jamul Tribe, rather than for the individual plaintiffs.

DISCUSSION

I. Legal Standards

A. Motion to Dismiss under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows for dismissal where there is a "lack of jurisdiction over the subject matter." *See* Fed. R. Civ. P. 12(b)(1). In ruling on defendant's motion, the Court is guided by well-established principles:

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994).

Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion "can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in doing so rely on affidavits or any other evidence property before the court." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Thus, the existence of disputed material facts will not preclude the court from evaluating for itself the merits of jurisdictional claims. *Id.* Because the plaintiff bears the burden of establishing subject matter jurisdiction, no presumption of truthfulness attaches to the allegations of the plaintiff's com-

plaint, and the Court must presume that it lacks jurisdiction until the plaintiff establishes jurisdiction. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

Whether a claim is ripe for adjudication is an issue of subject matter jurisdiction under the case or controversy clause of Article III of the federal Constitution. *St. Clair*, 880 F.2d at 201. As any other challenge to a Court's jurisdiction over the subject matter of a case, motions raising ripeness as an issue are properly brought under Rule 12(b)(1). *Id.* Once a party raises this issue, "[i]t then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *Id.* In deciding whether the case is ripe, the Court may look to this "extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes." *Id.* Similarly, issues of standing go to the Court's jurisdiction over the subject matter of the case and are properly raised in a motion to dismiss under Rule 12(b)(1). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

Pursuant to Rule 12(h), the Court must dismiss the action "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter." Fed. R. Civ. P. 12(h). Thus, although defendants previously filed a motion to dismiss based upon Rules 8(a) and 12(b)(6) and subsequently filed an answer to the complaint on November 1, 2001, the instant motion is nonetheless properly before the Court. Furthermore, because lack of subject matter jurisdiction is a matter in abatement, the Court may not rule on a summary judgment motion "or any other mat-

ter going to the merits" where the Court determines that it lacks jurisdiction over the subject matter. *Capitol Indus.-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118 (9th Cir. 1982).

B. Motion for Judgment on the Pleadings pursuant to Rule 12(c)

Federal Rule of Civil Procedure 12(c) allows a motion for judgment on the pleadings to be filed "after the pleadings are closed." Fed. R. Civ. P. 12(c). The motion may be brought by either party "when all material allegations of fact are admitted in the pleadings and only questions of law remain." Wright & Miller, 5A *Federal Practice and Procedure* § 1367, at 510-511; *see also Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984) (quoting an earlier version of Wright & Miller for the proposition that a 12(c) motion should only be granted where "the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law."); *accord Vashistha v. Allstate Ins. Co.*, 989 F. Supp. 1029, 1031 (C.D. Cal. 1997). In ruling on a Rule 12(c) motion, the courts must accept all well-pleaded factual allegations as true and determine whether the moving party is entitled to judgment under those facts. *See General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Cong. Church*, 887 F.2d 228, 230 (9th Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990). Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Doleman*, 727 F.2d at 1482.

If "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Fed. R. Civ. P. 12(c); *see also Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990) ("[J]udgment on the pleadings is improper when the district court goes beyond the pleadings to resolve an issue; such a proceeding must properly be treated as a motion for summary judgment.") (internal citations omitted).

C. Summary Judgment pursuant to Rule 56

Summary judgment is proper where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material issue of fact is present when a factual determination must be made by a jury to determine the rights of the parties under the substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). A dispute is only "genuine" when "the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant." *Anderson*, 477 U.S. at 255. In deciding a motion for summary judgment, the Court must examine all the evidence in a light most favorable to the non-moving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

A moving party who bears the burden of proof at trial is entitled to summary judgment only when the evidence indicates that no genuine issue of material facts exists. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 325. If the moving party does not bear the burden of

proof at trial, he may discharge his burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Celotex*, 477 U.S. at 325. The moving party is not required to produce evidence showing the absence of genuine issue of material fact on such issues, nor must the moving party support its motion with evidence negating the non-moving party's claim. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990); *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir.), *cert. denied*, 493 U.S. 809 (1989). Instead, "the motion may, and should, be granted so long as whatever is before the District Court demonstrates that the standard for the entry of judgment, as set forth in Rule 56(c), is satisfied." *Lujan*, 497 U.S. at 885 (quoting *Celotex*, 477 U.S. at 323).

Once the moving party meets the requirement of Rule 56 by either showing that no genuine issue of material fact remains or that there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings." *Id.* Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. To make such a showing, the non-moving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 325. Such evidence need

not be in a form admissible at trial to avoid summary judgment. *Id.* The moving party is entitled to judgment as a matter of law if the nonmovant fails to make a sufficient showing of an element of its case with respect to which it has the burden of proof. *Id.* Standing

II. Analysis

A. Motion to Dismiss under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction

1. Ripeness

Defendants first contend that plaintiffs' claim should be dismissed for lack of subject matter jurisdiction because the notice published by the Bureau of Indian Affairs indicates that no action has been taken on the pending application for trust status referred to by the notice. Absent a final agency decision on the matter referred to by the notice, defendants contend, plaintiffs may not allege a claim arising from the defendants' publishing of a notice "denying plaintiffs' entitlement and excluding them from their allotment of land in parcel 597-080-01." In their opposition, plaintiffs clarify that their claim is not based on the pending application for trust status but rather on the government's failure to issue a patent to parcel 597-080-01 when it accepted the parcel into trust in 1978. The publishing of the notice, plaintiffs emphasize, does not form the gravamen of their complaint. Rather, it merely put them on notice that no patent had issued from the government's acceptance of the parcel into trust. In light of plaintiffs' clarification of the nature of their claim in their opposition, it is clear that dismissal based on the ripeness doctrine is inappropriate. Because plaintiffs are challenging the government's failure to issue a patent to parcel 597-080-01, rather than the pending application

by the Jamul Tribe for trust status for parcels 597-060-04-00, 597-060-05-00, and 597-042-13-00 (*see* Defs.' Ex. A), ripeness is not a basis upon which the Court may grant dismissal.

2. Standing

Defendants next contend that the Court lacks subject matter jurisdiction over plaintiffs' action because plaintiffs lack standing. Defendants' standing argument is similar to its ripeness argument in that defendants contend plaintiffs have not been injured because there has been no final agency decision on the proposed trust acquisition of parcels 597-060-04-00, 597-060-05-00, and 597-042-13-00. Absent a final agency decision on the pending application, defendants contend, plaintiffs cannot show that they have suffered an injury in fact. Plaintiffs' opposition to this basis for dismissal parallels their opposition to defendants' ripeness argument. Plaintiffs emphasize that they are not challenging the pending application for trust status for parcels 597-060-04-00, 597-060-05-00, and 597-042-13-00. Rather, plaintiffs assert, the notice of the pending trust application posted on February 5, 2001 merely informed them that the Jamul Tribe planned to relocate plaintiffs' home sites onto the newly acquired trust land in order to construct gaming facilities on the site of plaintiffs' alleged allotment. (*See* Defs.' Ex. A at 3) (stating that the proposed construction of gaming facilities "will result in the relocation of our tribal headquarters and current home sites onto the proposed new trust lands").

Article III of the Constitution limits the jurisdiction of the federal courts to actual cases or controversies. U.S. Const. art III, § 2, cl. 1. In order to meet the requirement for a justiciable case or controversy, plain-

tiffs must have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."). The "irreducible constitutional minimum" of standing requires that: (1) plaintiff has suffered an "injury in fact;" (2) the injury is "fairly traceable" to the challenged conduct of the defendant, and not the result of the independent action of some third party; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Medina v. Clinton*, 86 F.3d 155, 157 (9th Cir. 1996) (citing *Lujan*, 504 U.S. at 560-61). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice to meet the plaintiffs' burden of proof as the party invoking federal jurisdiction. *See Lujan*, 504 U.S. at 561.

Given plaintiffs' recharacterization of their claim in their opposition, the Court finds that plaintiffs meet the three requirements for standing. Assuming plaintiffs' allegation that the United States holds land in trust for them individually to be true, plaintiffs have suffered an injury in fact by the government's failure to issue a patent to plaintiffs for parcel number 597-080-01. If the government indeed accepted parcel number 597-080-01 into trust for the benefit of the individual plaintiffs, interference with plaintiffs' use of the land may be fairly traceable to the government's alleged failure to generate the requisite patents to plaintiffs for the parcel. Finally, declaratory relief from the Court regarding plaintiffs' rights in the parcel may redress plaintiffs' injury in this case. To the extent that there exists a factual dispute regarding whether parcel number 597-080-01 was taken into trust for the benefit

of plaintiffs or for the Jamul Tribe, this issue may he resolved considering the evidence presented by defendants in support of their motion for summary judgment.

3. Failure to Exhaust Administrative Remedies

Finally, defendants argue that plaintiffs cannot pursue the instant action until they have exhausted their administrative remedies with respect to the proposed trust application for parcels 597-060-04-00, 597-060-05-00, and 597-042-13-00. As defendants note, the Jamul Tribe's application for the United States to take the above parcels into trust is still pending before the Secretary of the Interior. The February 5, 2001 notice referred to by plaintiffs in their complaint is merely one step in the process for trust applications with the Secretary of the Interior, defendants emphasize. Even after the Secretary issues a final decision regarding the trust status of the pertinent land, the decision can then be appealed to the Interior Board of Indian Appeals. (*See* Defs.' Mem. P. & A. at 9-10.) Only after the decision regarding trust status cannot be appealed to a superior authority in the Department of the Interior can the decision be considered a final decision subject to judicial review under the Administrative Procedure Act ("APA"). Defendants contend that because the Secretary of the Interior has not rendered a final decision regarding the application for trust status for parcels 597-060-04-00, 597-060-05-00, and 597-042-13-00, the Court may not adjudicate a challenge to the Secretary's decision at this time.

While defendants' analysis would be sound if plaintiffs' claim arose directly from the pending trust application, plaintiffs' opposition clarifies their position and establishes that their claim does not arise from the pending trust application but rather from the United

States' acceptance of parcel number 597-080-01 into trust in 1978. Consequently, plaintiffs' failure to wait for a final agency decision with respect to the application for trust status for parcels 597-060-04-00, 597-060-05-00, and 597-042-13-00 is not a basis upon which dismissal of the instant case is warranted. Because plaintiffs' claim does not arise from the pending application for trust status, defendants' argument based upon administrative exhaustion does not provide grounds for dismissal, judgment on the pleadings, or summary judgment.

B. Plaintiffs' Entitlement to Allotment

Defendants argue that even if the case were ripe and plaintiffs had standing and had exhausted their administrative remedies, dismissal, judgment on the pleadings, or summary judgment is appropriate because plaintiffs cannot claim allotment[1] rights in parcel number 597-080-01. Defendants contend that allotment as a form of ownership was abolished in 1934 and thus the conveyance of parcel number 597-080-01 in 1978 could not have vested plaintiffs with allotment rights entitling them to the issuance of a fee patent. In their opposition, plaintiffs argue that Section 461 of the Indian Reorganization Act of 1934 ended the United States' policy of granting allotments *of Indian land* to individual Indians, but the United States has continued to hold land in trust for both tribes and individual Indians subsequent to 1934. In particular, 25 U.S.C. § 465 contemplates that the United States may hold

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[1] As explained by the Supreme Court in *Affiliated Ute Citizens of Utah v. United States*, "Allotment is a term of art in Indian law. It means a selection of specific land awarded to an individual allotted from a common holding." 406 U.S. 128, 142-43 (1972).

land in trust for individual Indians. 25 U.S.C. § 465 ("Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.") Plaintiffs contend that the 1978 deed of parcel number 597-080-01 indicates that the United States took this property into trust for them and, thus, they seek a declaration of their rights in the parcel and the issuance of a patent to the parcel.

In order to determine (1) whether plaintiffs are entitled to an allotment and (2) whether the land was accepted into trust for the benefit of the individual plaintiffs, it is necessary to distinguish among the various forms of ownership of Indian land contemplated by federal law as of the year in which the United States accepted parcel number 597-080-01 into trust. Prior to 1934, the United States pursued a policy by which communal Indian property was divided and granted to individual tribal members. *See Babbitt v. Youpee*, 519 U.S. 234, 237 (1997). As noted by the Supreme Court in *Babbitt*, such "allotted lands were held in trust by the United States or owned by the allottee subject to restrictions on alienation." *Id.* Under the General Allotment Act of 1887, the United States would hold the land in trust for twenty-five years and then convey the land to the Indian or his heirs in fee discharged of the trust. *See* 25 U.S.C. § 348; *Atkinson Trading Co., Inc. v. Shirley*, 121 S. Ct. 1825, 1830 n.1 (2001) (noting that the General Allotment Act, 25 U.S.C. § 331 et seq., "authorized the issuance of patents in fee to individual

Indian allottees who, after holding the patent for 25 years, could then transfer the land to non-Indians").

This policy failed, as Indian land ownership became increasingly fractionalized, and individual owners were unable to productively use their small interests. *See id.* at 238. Thus, "Congress ended further allotment in 1934," *id.*, and "extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee patented) Indian lands," *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992) (citing 25 U.S.C. §§ 461, 462). The new Indian Reorganization Act of 1934 "reflected a new federal policy of halting the loss of Indian lands which had occurred under statutes that allotted tribal lands to individual Indians." *Chase v. McMasters*, 573 F.2d 1011, 1015 (8th Cir. 1978); *see also McAlpine v. United States*, 112 F.3d 1429, 1431 (10th Cir. 1997) (noting that "the IRA, among other things, prohibited any further transfer of Indian lands outside of the tribes and provided the Secretary authority to replace lands in lieu of those already allotted").

As shown by the above cases, plaintiffs' claim is, at best, a claim that is not yet ripe for adjudication. Even if the General Allotment Act remained unaffected by the Indian Reorganization Act of 1934, plaintiffs would have no right to a fee patent for at least 25 years after the land was taken into trust by the United States. Given that parcel number 597-080-01 was accepted into trust no earlier than 1978, (*see* Compl., Ex. B), plaintiffs would not be able to obtain a fee patent until at least 2003. Furthermore, as indicated by *Yakima*, when Congress passed the Indian Reorganization Act of 1934, it "extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee patented)

Indian lands." *Yakima*, 502 U.S. at 255. Thus, even if plaintiffs had received an allotment under the General Allotment Act, the trust period was extended indefinitely by the IRA, and plaintiffs would have no right to compel issuance of a fee patent for the parcel. *See id.*

Furthermore, it is clear from the 1978 deed that the pertinent statute under which parcel number 597-080-01 was accepted into trust by the United States, 25 U.S.C. § 465,[2] does not provide for the issuance of fee patents to beneficiaries of the land. Although 25 U.S.C. § 348 contemplates a twenty-five year trust period after which a fee patent would be issued to the beneficiary of the trust, section 348 is a part of the General Allotment Act of 1887 and is limited in its application to "allotments provided for in *this* Act." *See* 25 U.S.C. § 348 (emphasis added). In contrast, section 465, which sets forth the conditions under which parcel number 597-080-01 was accepted into trust by the United States, does not contemplate a point at which the United States will cease holding the land in trust and issue a fee patent to the beneficiaries of the land. Rather, section 465 merely states,

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any in-

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[2] Significantly, 25 U.S.C. § 465 contemplates the United States taking land into trust for the benefit of tribes *or* individual Indians. *See* 25 U.S.C. § 465 (stating that "title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired . . ."); *see also Chase v. McMasters*, 573 F.2d 1011, 1015 (8th Cir. 1978) (rejecting party's contention that section 465 does not authorize the Secretary of the Interior to acceptance conveyance of title to land already owned in fee by an individual Indian for his benefit).

> terest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

25 U.S.C. § 465. Plaintiffs point to no section *within the 1934 Act* providing for the issuance of a fee patent to Indians for whose benefit the United States holds land in trust under § 465.[3] Nor is the Court aware of any such provision. To the contrary, section 465 "set[s] forth a procedure by which lands held by Indian tribes may become tax exempt." *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998). Under section 5 of the pre-1934 General Allotment Act, 25 U.S.C. § 348, land upon which a fee patent is issued not only becomes alienable and encumberable upon the issuance of the fee patent, but it also becomes subject to taxation. *See Yakima*, 502 U.S. at 263 and n.l. The issuance of a fee patent for land taken into trust under section 465 would directly contradict section 465's policy of providing tax exempt land for Indians and

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[3] It is unclear from plaintiffs' complaint and briefs whether they seek to compel the government to issue a fee patent or a trust patent. At one point in their complaint, plaintiffs state that they are seeking issuance of a trust patent. (*See* Compl. at 8, ¶ 2.) However, plaintiffs cite to 25 U.S.C. § 348, which provides for the issuance of a fee patent after the expiration of a twenty-five year trust period. (*See id.* at 4, ¶ 9.) Furthermore, plaintiffs cite in their briefs to case law pertaining to the issuance of fee patents. (*See* Pls.' Opp'n to Mot. Summary Judgment at 4.) Regardless of whether plaintiffs seek to compel the issuance of a fee or trust patent, it is clear that plaintiffs' claim fails on ether basis in light of the 1978 deed's language designating the Tribe, rather than the individual plaintiffs, as the beneficiaries of parcel number 597-080-01.

Indian tribes. *See Cass County*, 524 U.S. at 114-15. Thus, plaintiffs are not entitled to governmental issuance of a fee patent to parcel number 597-080-01, property taken into trust by the United States under section 465.

Finally, considering the evidence presented by defendants in their motion, plaintiffs cannot claim rights in parcel number 597-080-01 separately from those of the Jamul Tribe. First, considering the language of the 1978 deed, it is clear that parcel number 597-080-01 was not conveyed in trust to the United States solely for the benefit of the individual plaintiffs but rather for the Jamul Tribe as a whole. The 1978 deed conveys this parcel to "[t]he United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." (Compl., Ex. B.) Simply because plaintiffs are by birth one-half degree or more Jamul Indian blood and have had continuous possession of the land does not result in the conclusion that they alone are entitled to control over the parcel. Rather, the language in the 1978 trust conveyance deed clearly refers to the Jamul Tribe, especially in light of the fact that the 1978 deed also references 25 U.S.C. § 479, which defines "Indian[s]" as "all persons of Indian descent who are members of any recognized Indian tribe." 25 U.S.C. § 479. Section 479a further provides that the Secretary of the Interior is vested with the authority to recognize Indian tribes. 25 U.S.C. § 479a(2). Thus, the 1978 deed's reference to "such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate" is a reference to the *tribe*, rather than to the individual half-blooded Jamul Indians then residing on the land.

In addition to the 1978 deed, the 1978 letter from the United States Department of the Interior, attached to defendants' reply as Exhibit L, also shows that parcel number 597-080-01 was taken into trust for the benefit of the Jamul Tribe, rather than for the individual plaintiffs. This letter notes that, as of March 15, 1978, the Department of the Interior "ha[d] received eleven signatures out of the thirteen ½ bloods for the Bureau of Indian Affairs to proceed with the proposed acquisition through a donation to establish the Jamul Indian Reservation." (Defs.' Ex. L.) Thus, plaintiffs cannot claim an individual right, allotment or otherwise, to parcel 597-080-01. Rather, the parcel is held by the United States in trust for the benefit of the Jamul Tribe.[4] *See* F. Cohen, *Handbook of Federal Indian Law*, at 472 (1982 ed.) ("The manner in which a tribe chooses to use its property can be controlled by individual tribe members only to the extent that the members participate in the governmental processes of the tribe."). Because there is no genuine issue of material fact with respect to plaintiffs' rights in parcel number 597-080-01 and defendants are entitled to judgment as a matter of law, summary judgment is appropriate in this case.[5]

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[4] To the extent that plaintiffs challenge the identity of the Jamul Tribe members and their leadership, this Court is not the proper forum for such a challenge. Rather, plaintiffs should continue to attempt to resolve their dispute regarding tribal leadership in the pending proceedings before the Interior Board of Indian Appeals. (*See* Pls.' Ex. D.)

[5] Because the Court finds that plaintiffs have raised no genuine issue of fact with respect to their entitlement to an allotment of parcel number 597-080-01, the Court does not address defendants' additional argument that the National Indian Gaming Commission is separately entitled to judgment on the pleadings. Even if plain-

CONCLUSION

Accordingly, for the reasons stated above, the Court **GRANTS** defendants' motion for summary judgment. The Court **DENIES** defendants' motion to dismiss, or in the alternative, for judgment on the pleadings.

IT IS SO ORDERED.

Dated: Feb. 13, 2002

/s/ IRMA E. GONZALEZ
IRMA E. GONZALEZ
United States District Judge

cc: Magistrate Judge Houston
all parties

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tiffs could establish allotment rights in parcel number 597-080-01, plaintiffs have not shown that their claim is ripe for judicial review given that the NIGC has not issued a final decision regarding the proposed gaming contract that is reviewable under Sections 701 through 706 of the Administrative Procedure Act.

(3)

Supreme Court, U.S.
FILED
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No. 03-895

IN THE

Supreme Court of the United States

WALTER ROSALES, MARIE TOGGERY AND KAREN TOGGERY, PETITIONERS

v.

UNITED STATES OF AMERICA, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS AND NATIONAL INDIAN GAMING COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

Whether a federally recognized Indian tribe is a necessary and indispensable party to an action by individual Indians to enforce their allotments of non-tribal land pursuant to 25 U.S.C. 345.

Whether individual Indians can be deprived of all rights and remedies provided by 25 U.S.C. 345, when a subsequently recognized Indian tribe falsely claims sovereignty over non-tribal land allotted to the individual Indians.

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I. THE GOVERNMENT STILL HAS ITS FACTS WRONG

It is amazing to what degree the Government has gone to avoid review of the denial of Petitioners' rights and remedies under 25 U.S.C. 345 to enforce their allotments in trust Parcel 597-080-01 ("the Parcel"), due to a false claim of sovereignty and the BIA's failure to follow its own guidelines when taking property into trust for the benefit of individual Native Americans. The Government continues to make the same erroneous factual claims made below.

1. Petitioners do not claim to own Parcel 597-080-01 ("the Parcel"). It is undisputed that the United States holds title to the Parcel. Petitioners do not challenge the United States' title, which is why the Ninth Circuit did not rule on the Government's erroneous claim of sovereign immunity. Petitioners' complaint "seeks the issuance of an allotment" described in *U.S. v. Mottaz* (1986) 476 U.S. 834, 845. C.A.E.R. 15-16. Title 25 U.S.C. 345 waives sovereign immunity for Petitioners' suit, which seeks the "issuance" of the documentation "for" the allotment.

It is undisputed that the Government took the Parcel into trust for the benefit of "such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." C.A.E.R. 21. It is undisputed that the Government failed to issue the allotments, which are generally issued as trust patents, not fee patents. Nor did the Government issue any other formal written designation of the specific half-blood Jamul Indians that were the trust beneficiaries of the Parcel.

It is also undisputed that the Tribe did not exist, had not been created under the I.R.A., and was not recognized, in 1978, when the Government accepted the

grant deed for the Parcel in trust for the individual Indians described therein. It also cannot be disputed that the Government failed to follow its own guidelines in recording the grant deed. 1 Opinions of the Solicitor of the Department of Interior Relating to Indian Affairs 1917-74 ("Mem. Sol. Int.") at 668, 724, 747, and 1479. Any transfer of the individual Petitioners' designated allotments to any subsequently recognized tribe, must still be accomplished by recording a grant deed. Here, no grant deed ever transferred the Petitioners' designated interest in the Parcel to any subsequently recognized tribe. *Coast Indian Community v. U.S.* (U.S.C.C. 1977) 550 F.2d 639, 651, n. 2, held on almost identical facts, that the parcel in question, "was not acquired for a tribe, leaving only the possibility under the [IRA] Act that it was purchased for individual Indians. The deed and proclamation say nothing to contradict this. Thus, the land was taken in trust for the individual Indians," as here.

As a matter of law, the Government is estopped by its own Solicitor's memoranda to deny that the Parcel is held in trust for the designated individual Indian beneficiaries, since the Government concedes that the "Jamul Indians of one-half degree or more Indian blood," were not recognized as a tribe in 1978. Memos. Sol. Int., at 668, 724, 747, and 1479; C.A.E.R.283-289. These memoranda admit that such trust acquisitions cannot be made for a "tribe" that does not yet exist.[1] There, Interior's Solicitor declared that a grant deed could not "designate" an un-recognized

[1] The Government failed to cite these memos to the District Court, which explains the District Court's erroneous findings, Gov. App. 1a, which were not adopted by the Ninth Circuit. Pet. App. 1a.

"tribe" as a beneficiary, since "there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe." Mem. Sol. Int., at 668. There, the Choctaw deed had to be amended and re-recorded to designate any subsequently recognized tribe a beneficiary, otherwise the property would remain in trust for the individual Indians, and not a tribe, as in *Coast*, 550 F.2d at 651.

U.S. v. State Tax Comm. (5th Cir. 1976) 535 F.2d 300, 304, similarly, holds that the absence of the words "then in trust for such organized tribe" in a relief act designating individual Choctaw beneficiaries meant that "only those individuals designated by the Interior Secretary were to have the benefit of this" designation, since "[n]either a tribe nor a reservation is mentioned."

2. The Government also fails to point out that the Interior Secretary's power to designate new Indian reservations under 25 U.S.C. 467, has not been used in California, since Congress specifically limited California to four Indian reservations in 1864, pursuant to The Four Reservations Act § 2, ch. 48, 13 Stat. 39, 40, and Congress never created an Indian reservation in Jamul. The Government's citation to a transmittal letter from a BIA realty officer suggesting a reservation may be established, C.A.E.R. 128, does not indicate that a reservation ever was established, and Interior's later memos indicate that none was established. C.A.E.R. 283-89.

Nor did the mere acquisition of land under 25 U.S.C. 465 somehow "establish" a reservation in Jamul. The Government's Handbook of Federal Indian Law ("Handbook") declares: "Any implication that lands purchased for tribes under section 5 of the IRA [25 U.S.C. 465] would constitute a reservation is negated by section 7 of that Act, 25 U.S.C. 467..." Ch. 1, Sec. D5,

page 45, fn. 158; *Sac & Fox Nation v. Norton* (10th Cir. 2001) 240 F.3d 1250, 1257; *Wisconsin v. Stockbridge-Munsee Community* (E.D. Wis. 1999) 67 F.Supp. 2d 990, 1003.

3. The Jamul Indian Village has never had jurisdiction over the Parcel, and there has never been a transfer of the Parcel or the allotments to the tribe. The Government erroneously implies that upon recognition of the tribe in 1981, the Village "claimed" jurisdiction over the Parcel. However, there is no evidence in the record of such a "claim." Contrary to the Ninth Circuit's erroneous assumption, Pet. App. 2a, there is no evidence in the record that the Jamul Indian Village ever "claimed jurisdiction over the Parcel." The Government's citation to the Jamul Indian Village constitution, C.A.E.R. 410, 414, is misleading. Though the constitution provides that Village jurisdiction "shall extend to all lands now within the confines of the Jamul Indian Village," C.A.E.R. 410, the Government conceded below that it has "no record of the 1978 trust parcel being known as the Jamul Indian Village." C.A.E.R. 177. There simply is no evidence in the record that the Parcel ever became subject to the jurisdiction of the subsequently recognized tribal governmental entity known as the Jamul Indian Village.

Moreover, the constitution does not describe any land within its jurisdiction; nor mention the Parcel, let alone provide any evidence that there was any land then "within the confines of the Jamul Indian Village." C.A.E.R. 410. The Jamul Indian Village is only a tribal governmental entity, and did not exist until its constitution was adopted in 1981. Similarly, the Federal Register listing of the tribe, 60 F.R. 9250, C.A.E.R. 266, does not create jurisdiction over the Parcel. "An Indian tribe's jurisdiction derives from the will of Congress,"

Kansas v. Norton (10th Cir. 2001) 249 F.3d 1213, 1229-31; Congress never granted "jurisdiction" over the Parcel to the subsequently recognized tribal governmental entity.

II. PETITIONERS' RESPONSE TO THE GOVERNMENT'S ARGUMENT

1. Contrary to the Government's assertion, Petitioners do not contend that the United States is "erroneously holding the Parcel in trust for the Jamul Indian Village." BIO 11. Rather, the Petitioners contend that the United States failed to properly issue the trust patents evidencing the Petitioners' allotments as designated beneficiaries of the trust Parcel, pursuant to 25 U.S.C. 334, 335, 345, 348 and 465. Petitioners do not claim that the United States "sold" or transferred the Parcel, as in *U.S. v. Mottaz* 476 U.S. 834 (1986). Rather, Petitioners make a claim "for" issuance of the documentation of their allotments. C.A.E.R. 14-16.

Petitioners do not challenge title to the Parcel. Title to the Parcel is held, as described in the grant deed. C.A.E.R. 21. Petitioners seek to enforce the "issuance of the allotments" for which they are the designated beneficiaries in the grant deed, just as in *U.S. v. Clarke* (9th Cir. 1976) 529 F.2d 984, 986; Arenas v. U.S. (1944) 322 U.S. 419, 432; *U.S. v. Arenas* (9th Cir. 1947) 158 F.2d 730, 746-47, and 749; *Gerard v. U.S.* (9th Cir. 1948) 167 F.2d 951, 952; *U.S. v. Pierce* (9th Cir. 1956) 235 F.2d 885, 888-91; *Antoine v. U.S.* (8th Cir. 1981) 637 F.2d 1177, 1181-82; *Christensen v. U.S.* (D. Nev. 1983) 575 F. Supp. 735, 737-38; which follow *Hy-Yu-Tse-Mil-Kin v. Smith* (1902) 119 F. 114, 115, affirmed, 194 U.S. 401 (1904).

The Government's assertion of the Quiet Title Act, 28 U.S.C. 2409a, was ignored by the Ninth Circuit, as it should be here. There is no authority that a claim

for allotment seeks an adjudication of title. "Thus, only disputes pertaining to the United States' ownership of real property fall within the parameters of the QTA." *Kansas*, at 1224. "Any challenge to a non-ownership interest in real property is not precluded by the QTA." *Dunbar Corp. V. Lindsey* (4th Cir. 1990) 905 F.2d 754, 759. *Navajo Tribe of Indians v. New Mexico* (10th Cir. 1987) 809 F.2d 1455, 1475, "adjudicating [] boundaries is conceptually quite distinct from adjudicating title to the same lands." As in the cases above, no individual Indian would have been allowed to claim their allotment, as a designated beneficiary of trust land, if the QTA barred such claims "for an allotment." Congress waived sovereign immunity for such claims in both 25 U.S.C. 345 and 28 U.S.C. 1353. "Because the action does not seek to quiet title to the tract, the QTA does not apply." *Kansas v. Norton, supra*, 249 F.3d at 1225.

2. Contrary to the Government's erroneous assertion, Petitioners not only cited and argued *Antoine v. U.S.* 637 F.2d 1177, 11781 (8th Cir. 1981), to the Ninth Circuit, but have steadfastly maintained throughout the proceedings below that determining whether an individual Indian should have received documentation for an allotment under section 345 requires no party other than the United States. C.A.AOB 17, ARB 26-30, C.A.E.R. 145, 251. See particularly, Petitioners' citation of *Citizen Band of Potawatomi Indian Tribe of Okla. v. Collier* (10th Cir. 1994) 17 F.3d 1292, 1294, in which the court found that no party other than the United States was required to litigate trust allotments, and that the Potawatomi tribe was not an indispensable party. ARB 27. Moreover, the Petitioners also argued below that there were alternatives to complete dismissal under F.R.C.P. Rule

19, including allowing the Government to assert any perceived interest of the tribe in response to the Petitioners' claims for damages. See, ARB 28, and the Petitioners' original claim and prayer for damages. C.A.E.R. 15-16.

3. Contrary to the Government's erroneous assertion, the Petitioners' claims for the issuance of their allotments in the Parcel do arise under 25 U.S.C. 345, pursuant to the cited statutory provisions, 25 U.S.C. 334, 335, 348, after acquisition of the Parcel under 25 U.S.C. 465. Following adoption of the IRA in 1934, the Government has routinely accepted private gifts of land in trust for the benefit of specific individual Indians under 25 U.S.C. 465. Such gifts are held in trust, and constitute "allotments" that are indistinguishable from any pre-1934 allotment. Such trust acquisitions under 25 U.S.C. 465 are treated as original "allotments." *U.S. v. Hemmer* (1916) 241 U.S. 379; *U.S. v. Washington* (9th Cir. 1956) 233 F.2d 811, 817; Handbook (DOI 1982) Ch. 11, Sec. B6, p. 628; see also for example, *Chase v. McMasters* (8th Cir. 1978) 573 F.2d 1011, 1016-17; *City of Tacoma v. Andrus* (D.D.C. 1978) 457 F.Supp. 342. Here, the Government cites no authority to the contrary, ignores its own treatise, and ignores 25 U.S.C. 335, which imposes the General Allotment Act on all subsequent trust acquisitions under 25 U.S.C. 465. Handbook (DOI 1982) Ch. 11, Sec. B3, p. 617-18; *U.S. v. Jackson*, 280 U.S. 183 (1930). See also, *Wisconsin v. Stockbridge-Munsee Community* (E.D. Wis. 1999) 67 F.Supp. 2d 990, 998, fn 3. "Statutes still in effect permit Indians to obtain allotments out of federal land. The General Allotment Act provides that nonreservation Indians settling on unappropriated federal lands are entitled to have the lands allotted to

them under the same terms as reservation allotments. 25 U.S.C. 334." Handbook., Ch. 11, Sec. B6, p. 627 (fn. omitted). "[S]ince 1934 [trust land acquisition for individual Indians] has been done pursuant to provisions of the IRA, 25 U.S.C. 465," and "[t]he status of such lands is indistinguishable from any other allotments and they should be treated alike. See 25 U.S.C. 335." Handbook Ch. 1, Sec. D3c, p. 40-41, fns. 118-19.

4. The Ninth Circuit's decision is still in conflict with the decisions of the Eighth and Tenth Circuits, where a tribe is not a necessary and indispensable party to an action to enforce an individual Indian's allotment under 25 U.S.C. 345. *Antoine v. United States ("Antoine")*, 637 F.2d 1177, 1181-82 (8th Cir. 1981); *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier ("Potawatomi")*,17 F.3d 1292, 1294 (10th Cir. 1994).

Contrary to the Government's attempt to distinguish *Antoine*, the Petitioners' allotments in private property were acquired under 25 U.S.C. 465, and are "indistinguishable from any other allotments and they should be treated alike," 25 U.S.C. 335, Handbook Ch. 1, Sec. D3c, p. 40-41. They are therefore just as "true" as those in *Antoine*, where the United States was held to be the only necessary and indispensable defendant to an action to enforce the issuance of the allotment.

Moreover, here, it is undisputed that the Petitioners are in possession of their allotments in the Parcel. As noted above, there is no evidence in the record of any other party or tribe actually "claiming" an interest in, or jurisdiction over, the Parcel or the Petitioners' allotments. However, as in *Coast, supra*, 550 F.2d 639, 651, any such claim would be "patently

frivolous" had it been made, and therefore not a "legally protected interest." *Davis v. U.S.* (9th Cir. 1999) 192 F.3d 951, 959. Just as in *Antoine*, there is no other necessary party to this dispute, other than the United States.

In *Antoine*, as here, the United States was the "allotting agent," since the United States has title to the property. As noted above, there simply is no distinction between pre-1934 allotments, and post-1934 allotments of private property acquired under 25 U.S.C. 465, as described in the grant deed here. C.A.E.R. 21. They are indistinguishable. Moreover, Petitioners have consistently sought damages, since the filing of the original complaint, in the alternative that the Government is not compelled to issue the proper documentation of their allotments in the Parcel. C.A.E.R. 15-16. Hence, the facts of *Antoine* are directly on point, and the decision directly in conflict with the Ninth Circuit's decision here.

Remarkably, the Government's attempt to distinguish *Potawatomi*, *supra*, 17 F.3d 1292, 1294 is even less on point, and actually concedes the existence of the conflict with the Ninth Circuit, where, as here, the tribe has no present interest in the Parcel. The Government concedes that where the tribe has "merely an expectation" in the property in question, it is not an indispensable party to an individual Indian's claim for an allotment under 25 U.S.C. 345. BIO 20.

There is no evidence in the record that the tribe claims an interest in the Parcel. The Ninth Circuit's assertion of such a "claim" of jurisdiction, is at best, erroneous, and was not supported by any citation to the record. Pet. App. 2a. The tribe never sought to intervene and make such a claim in the underlying action, even though its lawyer was present at every

hearing. Most importantly, the Government admits it has "no record of the 1978 trust parcel being known as the Jamul Indian Village." C.A.E.R. 177. There simply is no evidence in the record that the Parcel is, or ever was, subject to the jurisdiction of the subsequently recognized tribal governmental entity known as the Jamul Indian Village.

III. CONCLUSION

Therefore, as in *Potawatomi*, since the tribe "merely has an expectation," and, at best, a "patently frivolous" claim to the Parcel, the tribe is not an indispensable party. This petition should be granted, and the Ninth Circuit's conflicting decision should be reversed and remanded for trial.

Respectfully submitted

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